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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 318

SINASON TEICHER INTER AMERICAN GRAIN CORP.,

Petitioners,

AGAINST

COMMODITY CREDIT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1959

No. .....

SINASON TEICHER INTER AMERICAN GRAIN CORP.,
Petitioner,

AGAINST

COMMODITY CREDIT CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, a corporation dealing in grains and food commodities, plaintiff in the District Court and appellant in the Court of Appeals, in an action against Commodity Credit Corporation for damages for breach of contract, in which summary judgment was granted dismissing the complaint, which the Court of Appeals affirmed, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The first opinion (order) of the United States District Court, Southern District of New York (App.* p. 98a;

* The reference "App." herein refers to "Appendix to Appellant's Brief" in the Court of Appeals, being the only Appendix filed in that Court

Sugarman, D.J.), printed in the appendix hereto, *infra*, page 43, is not reported.

The second opinion of the United States District Court, Southern District of New York (App. pp. 112a-113a; Sugarman, D.J.), printed in the appendix hereto, *infra*, page 44, is not reported.

The first *per curiam* opinion of the United States Court of Appeals for the Second Circuit (R. p. 116a; Clark, Ch. J., Waterman and Edelstein, JJ), printed in the appendix hereto, *infra*, page 46, has not yet been printed in the reports. Reported adv. ops. 267 F. 2d 4

The second *per curiam* opinion of that Court, denying petitioner's petition for rehearing (R. p. 133a)., printed in the appendix hereto, *infra*, page 48, has not yet been printed in the reports. Reported adv. 267 F. 2d

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit (R. p. 118a) sought to be reviewed was dated and entered May 20, 1959.

The decision and order of said Court (R. 134a) denying petitioner's petition for rehearing was dated and entered June 15, 1959.

The jurisdiction of this Court is found in 28 U. S. C. secs. 1254(1) and 2101(c).

Questions Presented

1. Whether the "in store" sale provisions of the GRT-318 contract between Commodity Credit Corporation, as seller, and petitioner, as buyer, are mutually binding on both parties, or binding on the buyer but not binding on CCC*, or binding on neither.

---

* CCC as used herein, for brevity, means Commodity Credit Corporation.

2. Is CCC bound by the prices, terms, and conditions, including "in store" sale prices, terms, and conditions, determined and established by it pursuant to 7 U. S. C. sec. 1427 at the time of making, and which are embodied in, a contract made by it to sell agricultural commodities within or at the expiry of 180 days, or does CCC have under the statute or contract further power of re-determining and re-establishing the same after the making of the contract, or a right, not provided for in the contract, to terminate or rescind the contract or its "in store" sale provisions, upon expiry of 180 days, as to any part of the commodities not previously delivered pursuant thereto?

3. After having contracted fully and in detail for "in store" sale for unrestricted use, at pre-determined prices, terms, and conditions set forth in the contract, in the event of the buyer's failure to make export, with no provision in the contract for terminating or rescinding the "in store" sale provisions thereof, and having contracted that the terms and conditions set forth in the contract "shall constitute the entire contract between the buyer and CCC", and having refused the buyer's request for a 90 day extension of time within which to make export of the balance of the beans, can CCC lawfully terminate, rescind or refuse to perform the "in store" sale provisions as for the buyer's "failure to export the total quantity" (App. p. 55a)?

4. Are not the "in store" sale provisions of the contract, equally with the sale for export provisions thereof, within the authorization of 7 U. S. C. sec. 1427 that "The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section"?

Did they not involve, equally as did the sale for export provisions, the "determining" and "establishing" of the

"sales policies" and "prices, terms, and conditions" embodied therein, so that in the one case, equally as in the other, CCC's discretion under 7 U. S. C. sec. 1427 was "exercised" (*United States* v. *Speed*, 8 Wall. (75 U. S.) 77, 83) and "exhausted" (*United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, 319) when the contract was made?

Can CCC avoid them without even "determining" and "establishing" different "prices, terms, and conditions" under 7 U. S. C. sec. 1427 to evidence the insufficiency of those embodied in the contract and thus compel the buyer to guess at the start what his rights would be and to guess at the end what different "prices, terms, and conditions" might be the basis for depriving him of rights specified in the contract?

Can the event specifically provided for in the contract to occasion the "in store" sale be treated instead as a breach to avoid the "in store" sale, in the absence of any charge of fraud, bad faith or mistake?

5. Is not CCC liable to petitioner for loss of profits and damages caused by CCC's refusal to perform the "in store" sale provisions of the contract?

Is not CCC liable to petitioner at least for the loss of profits on 13,300 cw. of beans for which the petitioner had given export instructions, and which CCC estimated in a settlement offer at $16,093.00 (App. p. 97a)?

6. Was CCC entitled to summary judgment dismissing the complaint?

Statutory Provisions Involved

The statutory provisions involved (15 U. S. C. secs. 714, 714b(c), (g) Act of June 29, 1948, c. 704, secs. 2, 4, 62 Stat. 1070, 1072; and 7 U. S. C. secs. 1421(a), 1427, 1429,

Act of Oct. 31, 1949, c. 792, Title IV, secs. 401, 407, 412, 63 Stat. 1054, 1055, 1057, as amended) are printed in the appendix hereto *infra*, pages 49-51.

Basis for Federal Jurisdiction in District Court

The basis of federal jurisdiction in the United States District Court for the Southern District of New York, the court of first instance, is 15 U. S. C. sec. 714b(c), this being an action against Commodity Credit Corporation and plaintiff being a New York corporation engaged in business and having its principal office and place of business in the Borough of Manhattan, City and State of New York, within said Southern District of New York, as provided in said sec. 714b(c).

(Cf. *Sinason Teicher Inter American Grain Corp.* v. *Commodity Credit Corporation*, D. C. N. D. N. Y., 156 F. Supp. 310, dismissing former suit in the Northern District of New York as brought in the wrong district.)

Statement of the Case

By Announcement GRT-318, dated June 27, 1955, the Department of Agriculture announced contemplated sale by CCC of certain of its stocks of dry edible beans for export, but stating that "All bids shall be subject to the terms of this announcement and the appropriate supplement hereto" (App. p. 8a), and providing in detail, in secs. 4 and 7 of its "TERMS AND CONDITIONS" (App. pp. 9a, 13a-16a and *infra*, pp. 52-55) for "in store" sale for unrestricted use of all of the beans which a buyer failed to export within 60 days.

The "in store" sale price was specified as the higher of three prices of beans of the same class for domestic market purposes determined by CCC and in effect on

the date of CCC's acceptance of the buyer's bid (App. p. 14a), and would be about double the sale for export price.

Portland Supplement #1 to GRT-318, dated July 6, 1955, provided that "The terms and conditions of Announcement GRT-318, dated June 27, 1955, this supplement and the confirmation of sale executed by CCC and the buyer shall constitute the entire contract between the buyer and CCC" (App. p. 23a).

By telegram dated September 9, 1955 (App. pp. 77a, 108a) petitioner bid "subject terms of Announcement GRT-318", for the total offered quantity, requesting "an export period of up to 6 months if necessary instead of 60 days".

By telegram dated September 14, 1955 (App. p. 109a), CCC accepted petitioner's bid and stated "You are allowed 180 days from this date to complete exportation of these beans" and that "Letter of credit acceptable to CCC covering entire amount to be established not later than Sept. 26."

A "CONFIRMATION OF SALE" dated September 14, 1955 (App. p. 5a), was executed by the parties, which stated "all terms and conditions of Announcement GRT-318 to apply except" stated time changes.

An irrevocable letter of credit, dated September 29, 1955, for $657,000 (App. pp. 45a-46a) was submitted, which made no specific reference to the "in store" sale provisions.

By telegram (App. p. 47a) CCC stated it was not acceptable and requested its amendment.

An amended letter of credit, dated October 7, 1955 (App. 48a-49a), was submitted, specifically covering "the amount due C.C.C. on a 'in store' sale of beans for unrestricted use, resulting from the buyers' failure to take delivery of

the beans by March 12, 1956 or any written extension of that date granted by C.C.C."

Petitioner received delivery of and exported 28,805 bags of beans, within said 180 day period; but there remained 180,722 bags of beans not delivered for export at the expiration of said 180 days.

On March 7, 1956, petitioner gave export shipping instructions to CCC for an additional 13,330 bags of beans, and also requested CCC to grant a 90 day extension of the exportation date for the balance, reciting extreme ocean freight scarcity and disrupted European inland transportation system as a result of severe winter conditions which also caused absorption of storage space in main European ports (App. 53a, 40a-41a).

On March 9, 1956, CCC by telegram refused to honor petitioner's shipping instructions of March 7, 1956, and advised that CCC would not grant the extension of time for export requested by petitioner (App. 41a, 54a).

On March 16, 1956, CCC by telegram informed petitioner that petitioner's "failure to export the total quantity" of beans "purchased by" petitioner under the contract "within the 180 day period required" was a breach of contract "and therefore CCC has no obligation to deliver the balance of 180,722 cwt covered by the contract" and would hold petitioner responsible for any damages resulting from such breach (App. 55a, 41a).

This, and CCC's refusal to deliver the balance of the beans as per "in store" sale thereof for unrestricted use resulted in this action by petitioner as plaintiff for $325,-299.60 damages against CCC (App. p. 4a), in which CCC by answer counterclaimed against petitioner (App. p. 27a) for $565,659.86 damages (App. p. 29a).

Both parties moved for summary judgment (App. pp. 35a, 63a), with petitioner requesting determination of the

issue of liability, and that the question of damages be referred to a referee (94a).

By its first decision of July 31, 1958, the District Court (Sugarman, D. J.) held that there was an issue of fact as to what the parties meant by their contract, citing *Virgin Island Corp.* v. *W. A. Taylor & Co.*, 202 F. 2d 61, 67 (2nd Cir. 1953), and denied both the motion of petitioner and CCC's cross motion (App. p. 98a; and *infra*, p. 43).

Petitioner by order to show cause moved for reargument (App. p. 99a), which motion was opposed by CCC (App. pp. 110a-111a).

By second decision dated October 6, 1958, the District Court (Sugarman, D. J.) granted petitioner's motion for reargument, adhered to the denial of summary judgment to plaintiff, granted defendant summary judgment dismissing the complaint, adhered to the denial of summary judgment to defendant on its counterclaim, and dismissed the counterclaim; and judgment of dismissal was entered October 7, 1958 (App. pp. 112a-113a and *infra*, pp. 44-45).

Petitioner appealed to the United States Court of Appeals for the Second Circuit from all of such order and judgment except that part dismissing the counterclaim (App. pp. 114a-115a). CCC did not appeal.

That Court, by *per curiam* opinion of May 20, 1959 (R. pp. 116a-117a and *infra*, p. 47), affirmed, holding that CCC had not "contracted away the usual contract remedy of rescission" and that "plaintiff committed a material breach of contract justifying rescission by the defendant."

Petitioner duly petitioned for rehearing (R. 120a-132a) by a petition pointing out, among other reasons, that the "Court's very employment of the inapposite theory of

'rescission' necessarily involves recognition of, but failure of the Court to give effect to, what the contract itself calls the buyer's 'rights under the in store sale' (Contract, Sec. 4, App. 15a)" (R. p. 126a).

By a second *per curiam* opinion of June 15, 1959 (R. p. 133a, and *infra*, p. 48) that Court "conceded that the Court's reference to 'rescission' is technically inapposite;" but stated that "Nevertheless, we adhere to the position that the contractual provisions defining consequences of the buyer's failure are not exclusive and that the petitioner's default relieved defendant of further obligation to perform".

It thus treated petitioner's "failure to take delivery" of all of the beans for export within 180 days (which the contract specifically provides will occasion the "in store" sale on "prices, terms, and conditions" fully determined and set forth therein), as constituting instead a "default" which avoids (instead of an event which occasions) the "in store" sale agreed upon. This, notwithstanding that the agreement clearly distinguishes the two when it provides as "default" only (1) the buyer's failure to make the requisite financial arrangements (GRT-318, sec. 7(b), App. pp. 16a-17a), which it duly made, and (2) the buyer's failure to honor the sight draft which CCC agreed "will" and "shall" be drawn by it for the "balance of the amount due CCC" for the "in store" sale (GRT-318, sec. 4, App. pp. 14a-15a); and provides in detail for the "in store" sale if the buyer "fails to take delivery" for export within 180 days.

The Court did not in either of its decisions determine the meaning of the "in store" sale provisions, nor the effect of such meaning on the meaning of the whole contract and its sale for export provisions.

The Court did not in either of its opinions interpret 7 U. S. C. sec. 1427, nor the effect of the "in store" sale

provisions of the contract in the light of that statute's provisions as to CCC's "determining" and "establishing" the "prices, terms, and conditions" to be embodied in any contract of sale, and CCC's lack of any further right, power or discretion unilaterally to vary, terminate or rescind prices, terms, and conditions of sale, determined and established by it, once they are embodied by it in a contract, without express reservation in the contract of such a right, power or discretion.

The "In Store" Sale and "Upward Adjustment" Provisions of the Contract

The "in store" sale provisions of the contract and the corresponding separate "upward adjustment" provisions for reimported or unexported beans delivered for export are set forth in Appendix F, *infra*, pages 52-57.

REASONS FOR ALLOWANCE OF THE WRIT

1. The gravity and importance of the questions in the administration of the Agricultural Adjustment Acts.

The questions presented are of utmost gravity and importance as respects the functions, powers and activities of Commodity Stabilization Service and Commodity Credit Corporation in the national program of price support and stabilization and "facilitating the orderly distribution of agricultural commodities" (15 U. S. C. sec. 714).

Also, and in particular as respects the exercise by CCC of its powers

> to "enter into and carry out such contracts or agreements as are necessary in the conduct of its business" (15 U. S. C. sec. 714b(g));

to "dispose of or aid in the * * * disposition of surplus agricultural commodities" (15 U. S. C. sec. 714c(d));

to "sell any farm commodity owned or controlled by it at any price not prohibited by this section" 7 U. S. C. sec. 1427);

its "determining" and "establishing" of "sales policies" therefor "with respect to prices, terms, and conditions as it determines will not discourage or deter manufacturers, processors, and dealers from acquiring and carrying normal inventories of the commodity of the current crop" (7 U. S. C. sec. 1427); and

the "final and conclusive" effect of "Determinations" (7 U. S. C. sec. 1429), when embodied in a contract (Cf. *United States* v. *Speed*, 8 Wall. (75 U. S.) 77; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313).

They are of gravity and importance not only to (1) all persons, firms and corporations dealing or making any contract with the Commodity Credit Corporation or with the Commodity Stabilization Service, but also (2) to all manufacturers, processors and dealers affected in any way by the sales policies for agricultural commodities at any time determined or established, or by sales contracts at any time made, by Commodity Credit Corporation to dispose of agricultural commodities; (3) to the Commodity Stabilization Service and Commodity Credit Corporation themselves, and (4) to the public at large. (Cf. *United States* v. *Ruzicka*, 329 U. S. 287, where the writ was granted "because it raises questions of importance in the administration of the Agricultural Act of 1937".)

So important are these questions to all alike that petitioner believes that Government counsel, representing Commodity Credit Corporation as respondent herein, should desire, equally with petitioner, that a writ of certiorari be granted herein for their review and determination by this Court in this case.

Moreover, as hereinafter shown, the decision conflicts in principle with decisions of this Court and other high courts.

2 The "determining" and "establishing" of "prices, terms, and conditions" under 7 U. S. C. Secs. 1427 and 1429 was "final and conclusive", as to "in store" sale as well as sale for export, when embodied in the contract; and CCC could not terminate or rescind its "in store" sale provisions.

It is of utmost importance that this Court clarify the operation and effect of 7 U. S. C. secs. 1427 and 1429, and the functions and powers of Commodity Credit Corporation in respect to "determining" and "establishing" sales policies and "prices, terms, and conditions"; the making thereunder of contracts to sell farm commodities, which embody "prices, terms, and conditions" determined by CCC; and the "final and conclusive" effect of such "Determinations" when embodied in a CCC contract.

What is meant by "determining" and "establishing"* sales policies "in respect to prices, terms, and conditions as it *determines* will not discourage or deter" others?

---

* As any dictionary shows, these words mean to settle, to fix, to conclude, to ascertain positively, to decide, ascertain, define, limit, fix, resolve, to make steadfast, firm, stable, to settle on a firm or permanent basis, to found permanently, to make safe against harm, loss, defeat, and the like.

When is such "determining" and "establishing" to be done? When and how is it manifested?

Once the "determining" and "establishing" has been done and then embodied in the terms of a CCC contract of sale, is it subject thereafter to unilateral disclaimer, revision or rescission by CCC?

Did the requisite "determining" and "establishing" occur here? If so, when, and to what extent?

Do not the "in store" sale prices, terms, and conditions set forth in the contract herein constitute "prices, terms and conditions" thereby "determined" and "established" as provided in the statute?

If so, where is there any provision in either the statute or the contract for repetitive re-determining or re-establishing or rescission thereof with respect to this existing contract?

In *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, 319, this Court said:

> "There must be a point of time at which discretion is exhausted. * * * And, we repeat, there must be some point at which discretion ceases and obligation takes its place" (249 U. S. 318, 319).

In *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83, this Court said:

> "It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, *and a contract is made in which they have exercised that discretion*, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise" (75 U. S. 83). (Italics ours.)

It was CCC's contention below (App. p. 69a) that under the statute the "in store"-sale provisions of the contract sued on herein "gave to the Commodity Credit Corporation the right to compel buyer to an 'in store' purchase at a higher price for unrestricted domestic resale, if, and only if, the CCC in its absolute discretion determined that unrestricted disposal would not have an unstabilizing effect"; and (App. p. 80a) gave CCC "an option", with the right under the statute to determine at the expiry of 180 days whether "the delivery of the beans for unrestricted use would comply with the disposal policy of the Corporation and the statutory directives, considering all factors including the current price support program on the particular dry edible beans involved and the effect on prices to farmers and on the existing inventories of processors and dealers in such beans."*

But this discretion was already exercised in making the contract; no provision of the contract is pointed out which gives any further or new discretion or any such option; and there is no such provision (Cf. *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83).

This contention of CCC involves the erroneous theory that, notwithstanding the "in store" sale terms of its contract, and notwithstanding CCC's having already made the necessary "determining" and "establishing" of the in store sale "prices, terms and conditions" embodied therein, CCC has some continuing right of re-determining and re-establishing the prices, terms and conditions embodied in its contracts, which enables it to disavow or rescind at any time the in store sale prices, terms and conditions it has embodied in its contract.

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* Compare its assertion that if the contract had not required export within 180 days, defendant would have had no right to terminate the contract and refuse delivery on plaintiff's demand (App. p. 65a, par. 6).

Such contention of CCC and the decision below are contrary in principle to the decisions of this Court in *United States* v. *Speed, supra,* 8 Wall. (75 U. S.) 77, and *United States* v. *Purcell Envelope Co., supra,* 249 U. S. 313.

In *United States* v. *Speed, supra,* 8 Wall. (75 U. S.) 77, Simonds, for the United States, and Speed, made a contract by which 50,000 live hogs, and the cooperage, salt and other necessary materials, were to be delivered to Speed by the United States, and Speed was to do the work of slaughtering and packing (75 U. S. 78). This Court stated that "the last article of the agreement seems to be an express promise to furnish all the hogs mentioned in the contract" (75 U. S. 84). The report recites that:

> "During the season, there were furnished to the claimant 16,107 hogs; but owing to the high price of hogs, Simonds, with the approval of the Commissary-General, gave up the enterprise, and refused to furnish the remainder of the 50,000 hogs" (75 U. S. 79).

In rejecting arguments that, notwithstanding the absence of any provision therefor, the government had a right to terminate the contract at the discretion of the Commissary-General, this Court said:

> "While the commissary might have insisted on a provision in this contract that he should only be required to pay for packing as many hogs as he chose to furnish, for which he might in that event have been charged a higher price, *he did not do so, and cannot have the benefit of it as though he had.*
>
> "3. This answers also the third point, namely; that the agreement is to be treated as though that provision were in it" (75 U. S. 83). (Italics ours.)

This, we submit, equally answers the contention of CCC herein that it had a discretion, option or right, not expressed in the contract, to terminate, refuse to carry out or rescind the "in store" sale provisions of the contract; and equally answers, and requires reversal of, the decision of the Courts below herein.

Moreover, the statute itself provides, in 7 U. S. C. sec. 1429, that "Determinations made by the Secretary under this Act shall be final and conclusive"; and this would seem to comprehend determinations made by CCC, in view of the provision in sec. 1421(a) that "The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him."

GRT-318, containing in its "Terms and Conditions" the "in store" sale "prices, terms, and conditions", moreover, was issued by "The U. S. Department of Agriculture" (App. p. 8a), and thus in any case was within 7 U. S. C. sec. 1429.

The contention of CCC and decision of the Courts below mean that CCC at any time, and as often as it chooses, may rescind by final and conclusive determination any prior final and conclusive determination made by it or the Secretary and embodied in a contract; in other words, that the provision that "Determinations made * * * shall be final and conclusive" enables CCC instead to treat them and its contracts which embody them as being conditioned at all times on the discretion of CCC officials unilaterally to alter, terminate or rescind them, and contracts which embody them, with any action it takes being final and conclusive on the other party.

It is petitioner's contention that the "point of time at which discretion is exhausted" (*United States* v. *Purcell Envelope Co., supra*, 249 U. S. 313, 318) is when the

contract is made, unless CCC includes in the contract a provision for re-determination, revision, termination or rescission, and that in a contract such as this, where CCC included no such provision, it "cannot have the benefit of it as though he had" and the agreement cannot "be treated as though that provision were in it" (*United States* v. *Speed, supra,* 8 Wall. (75 U. S.) 77, 83).

Petitioner contends that the "in store" sale provisions of the contract sued on herein inherently involved, just as would an "in store" sale contract containing no sale for export provisions, a "determination" and "establishment", once and finally, at the time of the making of the contract, of all of the "prices, terms, and conditions" embodied therein.

It is submitted that respondent in effect concedes this by its affirmative assertion (App. p. 65a, par. 6) that "If the contract had not required export of the beans within the stated 180 day limit, defendant would have had no right to terminate the contract on plaintiff's admitted failure to do so, and thereafter refuse delivery on plaintiff's demand".

For this clearly recognizes that there is nothing in 7 U. S. C. sec. 1427 which prevents CCC from making a contract for "in store" sale for delivery for unrestricted use at the expiry of 180 days, with the "sales policies" and "prices, terms and conditions" determined under sec. 1427, once and finally, at the time of the making of the contract. And under *United States* v. *Speed, supra,* 8 Wall. (75 U. S.) 77, and *United States* v. *Purcell Envelope Co., supra,* 249 U. S. 313, it is clear that such "in store" sale "prices, terms, and conditions" would not be subject to unilateral redetermination or rescission by CCC.

That such a determination of "prices, terms and conditions" for "in store" sale was *inherently involved and*

actually was made in connection with the making of the contract herein is shown not only by the detailed provisions in GRT-318, sec. 4, for computing the "in store" sale price, but by the independent use in sec. 8 of the same formulae in connection with the "upward adjustment" of sales price of beans delivered for export within 180 days but either not so exported or which after being exported are re-entered into the United States.

Respondent and the Courts below have not contended or suggested that if any of the beans actually exported had been re-entered into the United States there could then be, by virtue of the provision for export within 180 days, a redetermination of sales policy or of prices, terms, and conditions to fix a different basis for "upward adjustment" than that specified in sec. 8.

Yet, sec. 8 is no more unqualified in this respect than is sec. 4 in respect to the sales price for "in store" sale for unrestricted use of the beans remaining undelivered for export at the expiry of 180 days.

Both provisions alike represented "sales policies" and "prices, terms, and conditions" deemed adequate and which were determined and established under 7 U. S. C. sec. 1427 at the time the contract embodying them was made.

In both cases, alike, therefore, the "point of time at which discretion (was) exhausted" (cf. *United States* v. *Purcell Envelope Co., supra*, 249 U. S. 313, 318) was the date of the contract which embodied these provisions; and the contract was one "in which they have exercised that discretion" (cf. *United States* v. *Speed, supra*, 8 Wall. (75 U. S.) 77, 83) equally for purposes of "in store" sale and for purposes of "upward adjustment" where beans delivered for export either are not exported or after being exported are re-entered into the United States;

and equally in both cases as had been the exercise of discretion for purposes of sale for export.

In both cases alike the provisions were as detailed and definite as were the provisions as to sale for export within 180 days. The sale clearly was not upon condition that export be made of all the beans within the 180 days (Cf. *Hale* v. *Finch*, 104 U. S. 261, distinguishing between conditions and covenants; and *Sawyer* v. *Prickett and Wife*, 86 U. S. 146, 162, distinguishing "promises and expectations" or "promissory representations").

In both cases alike, the provisions constitute covenants or agreements of both parties, which, whether they be independent of or divisible from the covenants respecting sale for export (Cf. *Pollack* v. *Brush Electric Assn.*, 128 U. S. 446; *Union Pac. Ry. Co.* v. *Travelers Ins. Co.*, 8 Cir., 83 Fed. 676; *Portfolio* v. *Rubin*, 1922, 233 N. Y. 439, 442), or be subsidiary terms which do "not split up the contract into as many contracts as there shall be deliveries" (*Norrington* v. *Wright*, 115 U. S. 188, 210, 211), "The seller is bound to deliver the quantity stipulated" (*Id.*, 115 U. S. 204), and to do this in accordance with the terms of the contract (*Norrington* v. *Wright*, *supra*, 115 U. S. 188, 204-205; *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 261; *Pope* v. *Porter*, 102 N. Y. 366, 370-371). This therefore requires completion of the sale and delivery at the expiry of 180 days, under the "in store" sale provisions of the contract, of all of the beans not theretofore delivered for export under its sale for export provisions.

Nothing remained to be done except to weigh the goods, compute the price, draw the drafts therefor and make delivery in store at the warehouse (Cf. *Sauer* v. *Waterbury*, 116 N. Y. 371, 373-374).

The export covenants of plaintiff constitute only a part of the consideration of defendant's contract, and the sale

for export constitutes only a part of the consideration of petitioner's contract (Cf. *Franklin Telegraph Co.* v. *Harrison*, *supra*, 145 U. S. 459, 469-471; *Kauffman* v. *Raeder*, 8 Cir., 108 Fed. 171, 179, 54 L. R. A. 247; *Howe* v. *Howe & Owen Ball Bearing Co.*, 8 Cir., 154 Fed. 820, 826; *Barnett Foundry Co.* v. *Crowe*, 3 Cir., 219 Fed. 450, 455).

A material part of the consideration to the buyer was knowledge that the "prices, terms, and conditions" already determined by CCC and embodied in the contract would enable the buyer to sell domestically the beans he could not export.

As respects contracts, whatever the subject matter, the Courts consistently sustain and enforce provisions of a contract designed to fix the rights of the parties according to the circumstances existing at expiry of a stated time.

For example, where a mining lease contains covenants to sink a well or begin operations within a stated time, the Courts have held the parties bound by other provisions to pay and accept a stated rental upon the lessee failing to perform a covenant to sink a well within nine months (*Guffey* v. *Smith*, 1914, 237 U. S. 101, 111, 116-117) or failing to perform a covenant to "begin operations within ninety days" (*Smith* v. *McCullough*, 8 Cir., 285 Fed. 698, 699-700).

In cases containing alternative promises, the promisor is entitled to perform either promise and enforce corresponding performance by the other party (*Foster* v. *Goldschmidt*, CCSDNY, 1884, 21 Fed. 70, 73; *Brockton Olympia Realty Co.*, 266 Mass. 557, 165 N. E. 876; *Talamani* v. *Ross*, 257 Ky. 236, 77 S. W. 2d 631; *Sperry & Hutchinson Co.* v. *Siegel Cooper & Co.*, 309 Ill. 200, 140 N. E. 967; *Skidmore* v. *Leavitt*, 73 Okl. 197, 175 P. 504).

In such cases, as said by Wallace, J., in *Foster* v. *Goldschmidt*, *supra*:

"The promise is in the alternative and the election with the promissor. The ancient case cited in *McNut* v. *Clark*, 7 Johns. 465, where the obligor promised to pay £20 or 20 bales of wool, established the rule."

Even provisions for stated rights or remedies on default of one of the parties will be enforced (*Anvil Mining Company* v. *Humble*, 153 U. S. 540, 551-552; *Hickman* v. *Sawyer*, 4 Cir., 216 Fed. 281; *Hill County Cotton Oil Co.* v. *Jonas*, 5 Cir., 29 F. 2d 327).

"The right to rescind is an extreme right, and it is not every breach of contract that warrants its exercise" (*Lewis* v. *New York Life Ins. Co.*, 3 Cir., 181 Fed. 433, 435). "The law seems to be settled that a refusal to fulfill a contract must be absolute to be equivalent to an assent to its dissolution, and to authorize the other party to rescind it; such refusal must be in no way qualified, and should substantially amount to an avowed determination of the party not to abide by the contract" (*Hoggson Bros.* v. *First Nat. Bank of Roswell*, 8 Cir., 231 Fed. 869, 872).

Here, where only two instances of possible "default" were specified, *i.e.*, (1) the buyer's failure to make the specified financial arrangements (GRT-318, sec. 7(b), App. pp. 16a-17a), and (2) the buyer's failure to honor the final "in store" sale draft (GRT-318, sec. 4, App. p. 15a), it clearly was not intended that the failure to make export of the beans within 180 days should also constitute a default; but such failure was the intended and expressed event which would make the pre-determined and carefully detailed "in store" sale "prices, terms, and conditions" operative on both parties.

In this contract—"a contract, too, framed by the United States" (*United States* v. *O'Brien*, 220 U. S. 321, 327), by its CCC instrumentality—the "in store" sale provisions

of sec. 4 and the "upward adjustment" provisions of sec. 8 are "the protection expressly stipulated by the United States", "The earlier clause under which the so-called annulment took place provides for no such consequence" (220 U. S. 328), but rather secs. 4 and 8 provide respectively for "in store" sale at pre-determined and detailed "prices, terms, and conditions" as to beans not delivered for export, and "upward adjustment" to the same pre-determined and detailed "prices, terms, and conditions" as to beans delivered for export but either not exported or which after being exported are re-entered into the United States. "If the United States wants more it must say so in plainer words" (*United States* v. *O'Brien*, *supra*, 220 U. S. 321, 328). CCC did not place in the contract a right to terminate or rescind it "and cannot have the benefit of it as though he had" (*United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83).

In negotiations before suit, CCC officials frankly stated that if bean prices had greatly fallen, CCC would have required that petitioner perform the high-priced "in store" purchase as per sec. 4 of the contract or suffer CCC to sell for petitioner's account, with petitioner being liable for any deficiency of the "in store" sale "amount due by the buyer under this section," as provided in the last paragraph of sec. 4 (App. p. 15a). We believe the contract would have entitled CCC to do so. But this is because, we believe, the "sales policies" involved, and the "prices, terms, and conditions" of "in store" sale for unrestricted use had been determined and established by CCC when the contract was made, and were set forth in detail and agreed to by both parties therein.

Petitioner submits that the "in store" sale provisions, having thus been determined and established by CCC and embodied in the terms of the contract, are *mutually* binding, and that petitioner equally has enforceable rights when CCC refuses to perform.

CCC's notification that it considered the contract at an end was a breach entitling the buyer to recover damages (*Underhill* v. *Buckman Fruit Co.*, 97 Md. 229, 54 Atl. 873).

Petitioner also submits, as this Court said in *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318:

> "And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own."

It is, we submit, of the utmost importance to the proper functioning of Commodity Credit Corporation and to all who deal with it or bid upon the faith of its contractual proposals or who in any way may be affected by its "sales policies" and contracts, that this Court grant a writ herein and determine, in the interest of all, whether "in store" sale contracts thus made bind both parties, or bind the buyer but not CCC, or bind neither.

3. The contract contains two successively operative "prices, terms, and conditions", determined and established by CCC under 7 U. S. C. Sec. 1427, with agreement that CCC "will" and "shall" draw the in store sale drafts, for reasons which negative any discretion, and with no right in CCC to terminate or rescind the buyer's "rights under the in store sale", except for failure to honor a sight draft.

That the contract herein was made by CCC pursuant to 7 U. S. C. sec. 1427 is indisputable.

That statute charges CCC with the duty of "determining" and "establishing" the "prices, terms, and conditions" embodied in its contracts of sale.

The making of any contract of sale, therefore, "raises a presumption" (Cf. *Green County, Kentucky* v. *Quinlan*, 211 U. S. 582, 593), that all the "prices, terms, and conditions" embodied in the contract, have been determined and established as the statute requires.

Moreover, a contract as detailed and complete as this one is a contract "in which they have exercised that discretion" (*United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83). And this is as true respecting the "in store" sale provisions, as respecting the sale for export provisions.

The contract for sale of 210,000 sacks of beans contains in its "TERMS AND CONDITIONS" (App. p. 9a)—on the faith of which petitioner made its bid and contracted as purchaser (Cf. *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77; *United States* v. *Purcell Envelope Co.*, *supra*, 249 U. S. 313)—two complete sets of prices, terms and conditions of sale, viz.:

> (a) provisions fixing the prices, terms and conditions of sale for export of beans delivered for export within 180 days, including "upward adjustment" of price if any beans delivered for export either are not exported or after being exported reenter the United States (GRT-318, secs. 1-3, 8-9, App. pp. 9a-13a, 17a-18a); and
>
> (b) provisions fixing the prices, terms and conditions of "in store" sale for unrestricted use of all beans remaining undelivered for export at the expiry of 180 days, and providing, for reasons that negative any discretion, that CCC "will" and "shall" draw drafts therefor (GRT-318, sec. 4, App. 13a-15a).

The sale for export price was to be the price stated in the buyer's bid, or such price plus a recited premium or

less a recited discount according to grade of the beans (App. p. 10a), and subject to the "upward adjustment" of price of beans delivered for export but not exported or which after being exported re-enter the United States (App. pp. 17a-18a).

The "in store" sale price was to be the higher of three specified CCC determinations "in effect on the date of CCC's acceptance of the buyer's bid" (App. p. 14a).

Both forms of sale are specified in sec. 6 (App. pp. 15a-16a), as a basis of passing of title and all risk of loss, damage or deterioration to the buyer.*

Both are specified in sec. 7 (App. pp. 16a-17a), setting forth requirements of advance "Financial Arrangements" to cover both the sale for export price and "the amount due CCC on an in store sale of the beans for unrestricted use resulting from the buyer's failure to take delivery of the beans within 180 calendar days".**

There follows in sec. 8 the above mentioned complete provisions for an "upward adjustment" in sales price of beans delivered for export within 180 days but either not so exported or which after being exported are reentered into the United States.

Inasmuch as the three formulae specified in sec. 8 for calculating such "upward adjustment" are identical with

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* The authority of CCC to make purchases or sales apparently requires a contract whereby title is to pass. (Cf. *Land O'Lakes Creameries Inc.* v. *Commodity Credit Corporation*, 8 Cir. 1959, 265 F. 2d 163, 165; *Kraft Foods Co. of Wisconsin* v. *Commodity Credit Corporation*, 7 Cir. 1959, 266 F. 2d 254, 262-264.)

** Petitioner, at CCC's demand (App. p. 47a), provided an amended letter of credit specifically to cover "the amount due C.C.C. on a 'in store' sale of beans for unrestricted use, resulting from the buyer's failure to take delivery of the beans by March 12, 1956 or any written extension of that date granted by C.C.C." (App. p. 48a).

but stated independently of the same three formulae specified in sec. 4 for calculating the sales price for the "in store" sale for unrestricted use, the separate statement of the three formulae by the separate sections 4 and 8, each complete in detail, shows doubly that they had been "determined by CCC" and emphasizes the separate or alternative, but equally mutually binding character of (a) the provisions controlling sale for export of beans delivered for export within 180 days, and (b) the provisions controlling "in store" sale for unrestricted use of all of the beans remaining undelivered for export at the expiry of 180 days.

Both the "in store" sale price of beans undelivered for export, and the "upward adjustment" as to beans delivered for export but either not exported or which after being exported later reenter the United States, are more than double the base sale for export price, and provide for unrestricted use.

They do not provide penalties or options, but a "sales price" and upward adjustment of "the sales price", both agreed to by the parties.

The contract does not provide that CCC in its discretion may draw the "in store" sale drafts, but provides affirmatively and unqualifiedly, in sec. 4 (App. pp. 14a-15a), that the "in store" sale drafts "*will*" and "*shall*" be drawn by CCC; and the buyer having made the requisite "financial arrangements", it is only in the event that the buyer fails to honor a final draft that CCC "may terminate his rights under the in store sale because of his default".

The reason for these provisions that CCC "will" and "shall" draw the "in store" sale drafts is perfectly apparent, and itself negatives any theory of discretion.

Although the "in store" sale price formula was fixed, it was computable "on the basis of the official grades shown on the inspection certificates"—which would be in CCC's possession—and "The total amount due under this section shall be the amount of such sales price plus any unpaid storage or other charges for which the buyer may be liable" (App. p. 14a).

The buyer could not have sufficient information to compute accurately any final payment required thereby so as to tender the right amount in payment thereof. The beans were in CCC's possession, in warehouses, and only CCC had information as to how many bags were of one or another of the differently priced "official grades", essential to the computation of the final "in store" sale price to be paid by the buyer. Also, only CCC was in position to compute the "unpaid storage or other charges for which the buyer may be liable" (App. p. 14a).

Hence, it was agreed that one draft "*will* be drawn by CCC against the full amount of the letter of credit in partial payment of the amount due CCC"; that "The balance of the amount due CCC *shall* be covered by a sight draft drawn by CCC upon the buyer"; and that "*In the event that the buyer fails to honor such sight draft*, CCC may terminate his rights under the in-store sale because of his default" (App. pp. 14a-15a).

The use of the word "may" in this provision that on failure by the buyer to honor the sight draft CCC "may terminate his rights" is in close and direct contrast to the words "will" and "shall" used in the provision requiring CCC to draw the in store sale drafts.

In *United States* v. *Gleason*, 175 U. S. 588, 605, this Court distinguished "may be allowed" and "shall be allowed", when used in a Government contract, by holding

that the former involves "an appeal to the discretion and decision of the officer", whereas the latter confers "an absolute right", determinable by a Court (175 U. S. 605).

It was, therefore, CCC's absolute obligation and petitioner's absolute right that CCC draw the in store sale drafts; and only in the event that petitioner should fail to honor the final sight draft was it left to the discretion and decision of CCC to terminate petitioner's "rights under the in store sale".

It will be noted, in this connection, that the "in store" sale provisions are not merely an agreement of the buyer; —sec. 4 specifically states that "it is agreed by the *parties* hereto" (App. p. 13a), and this means both petitioner and CCC.

Whether the sale for export provisions and the "in store" sale provisions be considered two contracts in one (Cf. *Burdon Sugar Refining Co.* v. *Payne*, 167 U. S. 127, 144, 147) or one contract with two successively operative provisions (Cf. *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459, 469, 470), it is a contract binding both parties to its "in store" sale provisions with CCC having no further discretion and no right to terminate or rescind either part of the contract (Cf. *United States* v. *Speed*, 8 Wall. (75 U. S.) 77, 83; *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318-319).

The decision herein conflicts in principle with this Court's decisions in *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83; *United States* v. *Purcell Envelope Co.*, *supra*, 249 U. S. 313, 318-319, and *Franklin Telegraph Co.* v. *Harrison*, *supra*, 145 U. S. 459, 469, 470 and must be reversed because there is nothing in CCC's statutory powers as to the "determining" and "establishing" of "sales policies" and of "prices, terms, and conditions"

(7 U. S. C. sec. 1427) to afford CCC a power to re-exercise its discretion and terminate or rescind its contracts, such as this Court held did not exist in *United States* v. *Speed* and *United States* v. *Purcell Envelope Co., supra.*

4. The affirmative provision that GRT-318, Supplement #1 thereto and the confirmation of sale "shall constitute the entire contract", and the specific confirmation of in store sale Secs. 4 and 7 "to apply", made Secs. 4 and 7 definite parts of the contract and preclude their rescission, in the absence of any reserved right to rescind the same.

GRT-318 (App. pp. 8a-21a) initially was an "Announcement" (*Id.*, p. 8a; cf. *Commodity Credit Corp.* v. *Rosenberg Bros. & Co.*, 9 Cir., 243 F. 2d 504), requesting bids (cf. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 315).

It was followed by Portland Supplement #1 thereto (App. pp. 21a-23a); petitioner's telegraphic bid (App. pp. 77a, 108a); CCC's telegraphic acceptance of bid (App. p. 109a); the confirmation of sale dated September 14, 1955 (App. p. 5a); first letter of credit dated September 29, 1955 (App. pp. 45a-46a); CCC telegram requiring amendment of letter of credit (App. p. 47a); and amended letter of credit dated October 7, 1955, specifically covering "'in store' sale of beans for unrestricted use" (App. pp. 48a-49a)

Portland Supplement #1 provided that:

> "The terms and conditions of Announcement GRT-318, dated June 27, 1955, this supplement and the confirmation of sale executed by CCC and the buyer shall constitute the entire contract between the buyer and CCC. Any special terms or

> conditions, not covered herein or under Announcement GRT-318, will be stated in the confirmation of sale which will govern with respect to such special terms and conditions" (App. p. 23a).

Secs. 4 and 7 of GRT-318 (App. pp. 13a-15a; 16a-17a) contained the "in store" sale provisions; and they and the sale for export sections specified 60 days for export, with an "in store" sale for unrestricted use to take effect as to any beans not delivered for export within 60 days.

Petitioner's bid having requested six months for export (App. pp. 77a, 108a), it remained for the confirmation of sale to state any special terms or conditions, and to "govern with respect" thereto (App. p. 23a).

The confirmation of sale, accordingly, would govern whether the "in store" sale provisions would be eliminated or confirmed. Up to the time of its execution September 14, 1955, inasmuch as petitioner's bid was not strictly in accord with the Announcement, and because of the provision in Supplement #1 that "special terms or conditions * * * will be stated in the confirmation of sale which will govern with respect to such special terms and conditions", CCC could have required, if it chose, that the provisions for "in store" sale in secs. 4 and 7 be eliminated.

But once that confirmation of sale was executed, the contract was fixed and binding on both parties (cf. *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83; *United States* v. *Purcell Envelope Co.*, *supra*, 249 U. S. 313, 318).

As this Court said in *Whiteside* v. *United States*, 93 U. S. 247, 255:

> "Two minds are required to make a contract, or to change its terms and conditions after it is exe-

cuted; and, if so, it is clear that the supervising special agent could not alter or vary the terms and conditions of the contract in this case without the consent of the petitioners, * * *."

And the confirmation of sale did not eliminate, but expressly specified "to apply", the "in store" sale provisions of secs. 4 and 7 equally with the sale for export provisions, by providing:

"(12) *Basis of Settlement: Per GRT-318*

* * * * *

"OTHER: Entire quantity to be exported within 180 days from September 14, 1955. *All terms and conditions of Announcement GRT-318 to apply* except that reference to 60 days under Items 2, 3, 4, 5, *7 and 8* are hereby changed to read 180 days; and letter of credit is to be effected for 220 days instead of the 90 days as provided in *Item 7* of GRT-318." (Italics ours.)

The ground on which, in some cases, notwithstanding unforeseen difficulties and hardship, a party will be held to performance of a particular covenant, is that "it might have been guarded against by a proper stipulation" (*Carnegie Steel Co.* v. *United States*, 240 U. S. 156, 165; *The Harriman*, 9 Wall. (76 U. S.) 161, 172-173), and because such parties "made no provision for a dispensation" (*Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399, 412; *United States* v. *Gleason*, 175 U. S. 588, 602; *Dermott* v. *Jones*, 2 Wall. (69 U. S.) 1, 8).

If secs. 4 and 7 had not been included in the contract herein, or had been eliminated therefrom by the confirmation of sale, a Court would have been justified in saying that only sale for export was provided for and that fail-

ure to export constituted a breach—because "it might have been guarded against by a proper stipulation" or "dispensation".

But here, precisely the requisite "proper stipulation" or "dispensation" exists in the "in store" sales provisions, set forth as part of the "TERMS AND CONDITIONS" (App. pp. 9a, 13a-17a); and they cannot be varied (*Whiteside* v. *United States*, *supra*, 93 U. S. 247, 255) nor terminated nor rescinded (*United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83; *United States* v. *Purcell Envelope Co.*, *supra*, 249 U. S. 313, 318-319) by unilateral action of CCC.

5. In attempting to avoid the "in store" sale provisions determined and agreed to, CCC made no "determining" and "establishing" of different "in store" sale "prices, terms and conditions" under 7 U. S. C. Sec. 1427 to evidence any insufficiency of those embodied in the contract, and cannot thus compel a buyer to guess at the start what his rights would be and to guess at the end as to what different "prices, terms, and conditions" might be the basis for CCC depriving him of the rights specified in the contract.

CCC is an administrative "agency and instrumentality of the United States, within the Department of Agriculture" (15 U. S. C. sec. 714).

As such, it is subject, as are all administrative agencies, to the making of such findings and determinations as required by statute, and within the limitations prescribed by statute.

This Court has held that under "general principles of constitutional government", if an administrative agency is authorized and required to make a finding, the validity

of its action with respect to any matter "must rest upon the needed finding. If it is lacking, the order is ineffective;" (*Wichita R. R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 58-59; *Mahler* v. *Eby*, 264 U. S. 32, 44-45. To same effect, *United Gas Co.* v. *Mobile Gas Corp.*, 350 U. S. 332, 346; *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355; *United Gas Co.* v. *Memphis Light, Gas and Water Division*, 358 U. S. 103, 108).

We submit that CCC is "contractually foreclosed from changing without the agreement of the purchaser" (cf. *United Gas Co.* v. *Memphis Light, Gas and Water Division*, *supra*, 358 U. S. 103, 108) the "in store" sale "prices, terms, and conditions" embodied in its contract with petitioner, and which "would else be a mockery" (*United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318).

But if it were not "contractually foreclosed", we submit that, since its powers under 7 U. S. C. sec. 1427 involve the "determining" and "establishing" of "prices, terms, and conditions", it cannot, without an equivalent "determining" and "establishing" of different "prices, terms, and conditions", avoid those previously determined and established and embodied in the contract (Cf. *United Gas Corp.* v. *Mobile Gas Corp.*, *supra*, 350 U. S. 332, 346); for there would be "lacking" a "needed finding" upon which must rest any claimed insufficiency of its previous determination (Cf. *Wichita R. R. and Light Co.* v. *Public Utilities Commission*, *supra*, 260 U. S. 48, 58-59; *Mahler* v. *Eby*, *supra*, 264 U. S. 32, 44-45).

To hold otherwise is to enable CCC to avoid a formalized and definite determination embodied in a contract by a subsequent vague and indefinite conclusion involving guess and uncertainty.

This Court has held, as the headnote states in *International Harvester Co. of America* v. *Kentucky*, 234 U. S.

216, that "to compel a man to guess what the fair market value of commodities manufactured or sold by him would be under other than existing conditions is beyond constitutional limits"; and, as stated in the opinion, "is to exact gifts that mankind does not possess" (234 U. S. 224). (See also *Collins* v. *Kentucky*, 234 U. S. 634, 638.)

Yet, here, notwithstanding the definite determination, embodied in the contract, of the "prices, terms, and conditions" for "in store" sale, the decision below would compel a buyer to "guess" after execution of the contract what his rights might be thereunder, different than as expressed therein, and then later to "guess" as to what insufficiency of the "in store" sale "prices, terms, and conditions" embodied in the contract CCC assumed (but without "determining") as affording a basis for depriving the buyer of the rights specified in the contract.

This, we submit, is in derogation of the "determining" and "establishing" requirements of 7 U. S. C. sec. 1427, and not within the power of CCC as an administrative agency of government.

6. *Commodity Credit Corp.* v. *Rosenberg Bros. & Co.*, 9 Cir., 243 F. 2d 504, relied on by respondent below, is distinguishable from this case and *United States* v. *Speed*, 8 Wall (75 U. S.) 77, 83.

In the *Rosenberg* case, Rosenberg Bros., influenced by a CCC announcement that it intended buying only 61,000 tons of raisins, and speculating that with no greater price support from CCC the price of raisins would fall before time for delivery, sold short a quantity of raisins to CCC, by a contract which did not embody such announcement. Before time for the Rosenbergs to perform under the short sale, CCC changed its program and bought from others 60,000 tons more than the 61,000 tons previously

announced. This caused the price to rise rather than fall, and the Rosenbergs stood to lose instead of profit by purchasing to fill their speculative short sale to CCC. CCC refused to release the Rosenberg contract or to extend the time for performance, whereupon the Rosenbergs bought and made delivery to CCC, and then sued CCC for the amount of their loss. The Court held that if the Rosenbergs intended to litigate, they should have refused to perform the contract and should then have asserted their contentions as a defense to any suit by CCC, and that they could not claim damages for voluntary performance. In this respect the decision has no application here.

CCC cited the *Rosenberg* decision below, however, for language contained therein respecting CCC's freedom to adjust and readjust its operations, so as not to be precluded by the Rosenberg contract from making further and different contracts with others with respect to raisins not covered by the Rosenberg contract. But this involves a point entirely different from that involved in *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83, and in the case at bar.

Indeed, the *Rosenberg* decision emphasized that the announcement was not embodied in the contract, and that no effort was made by CCC to change or avoid in any way the terms of the Rosenberg contract.

Here, by contrast, Announcement GRT-318 was embodied in the contract, and CCC seeks to avoid certain of its basic provisions.

It was not contended in *United States* v. *Speed*, *supra*, and we do not contend, that Speed's contract therein could have precluded the commissary from making with others such other and further contracts as it chose for the commissary to deliver to others to slaughter and pack, on different prices, terms and conditions, hogs in addition to those contracted for in Speed's contract.

And we do not contend that CCC was precluded by petitioner's contract from buying or selling other beans to others than petitioner at prices, terms and conditions differing from those embodied in petitioner's contract.

Petitioner's contention, fully supported by *United States* v. *Speed, supra*, is that as respects petitioner's contract itself, CCC's discretion was exhausted when the detailed "in store" sale provisions were embodied in that contract, because it contains no provision for a re-determination and re-establishment or rescission of its "in store" sale prices, terms and conditions; and the contract cannot "be treated as though that provision were in it" and CCC "cannot have the benefit of it as though he had" (*United States* v. *Speed, supra*, 8 Wall. (75 U. S.) 77, 83).

There is nothing in the *Rosenberg* decision to the contrary. Rather, we submit, the *Rosenberg* decision supports the point that provisions embodied in the contract cannot be unilaterally altered or avoided.

The decision herein, therefore, conflicts in basic principle with *United States* v. *Speed, supra*, 8 Wall. (75 U. S.) 77, 83 and with *United States* v. *Purcell Envelope Co., supra*, 249 U. S. 313, 318, 319, and is not supported by the *Rosenberg* decision.

7. The failure of the lower Courts to determine what the "in store" sale provisions mean, and the effect of their meaning on what the whole contract and its sale for export provisions mean violates fundamental principles established by decisions of this Court, and is of utmost importance to review and correct.

Although the Courts below have rendered four decisions herein—two by the District Court (App. pp. 98a, 112a-113a, and *infra*, pp. 43, 44), and two by the Court of Appeals (R. pp. 116a-117a, 133a, and *infra*, pp. 47, 48), all

varying in their reasoning, neither Court has determined the questions really at issue, viz.: (1) What is the meaning of the "in store" sale provisions and of what the contract itself calls the buyer's "rights under the in store sale" and of the only "default" specified for which CCC may terminate such in store sale "rights" (GRT-318, sec. 4, App. p. 15a); and (2) What is the effect of their meaning on what the contract and its sale for export provisions mean?

The lower Courts' decisions are premised on first spelling out a "breach" from the sale for export provisions alone, as a basis for then avoiding, and not interpreting and applying, the "in store" sale provisions.

But the case requires instead that the meaning of the "in store" sale provisions be first determined and taken fully into account for ascertaining the meaning of the whole contract and its sale for export provisions; whereupon, the basic premise of the lower Courts' decisions falls.

"The intention of the parties is to be ascertained by an examination of *all they have said in their agreement, and not of a part only*" (*Black* v. *United States*, 91 U. S. 267, 269). (Italics ours.)

This Court accordingly has held that a "contract must be so construed as *to give meaning to all its provisions*, and that that interpretation would be incorrect which would *obliterate one portion* of the contract in order to enforce another part thereof", or which would "destroy the one in order to give effect to the other" (*Burdon Sugar Refining Co.* v. *Payne*, 167 U. S. 127, 142, 144). (Italics ours.)

"What, then, is the true construction of the contract? The answer to this question is not to be found in any *name* which the parties may have given to the instrument,

and *not alone in any particular provisions it contains,* disconnected from all others, but in the ruling intention of the parties, gathered from *all the language they have used.* It is the legal effect of *the whole* which is to be sought for. The form of the instrument is of little account" (*Heryford* v. *Davis,* 102 U. S. 235, 243-244). (Italics ours.)

In the *Heryford* case, notwithstanding that a contract respecting railroad cars provided for a "loan" of them "for hire" for four months, and "Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company *for hire,* for four months, and delivering them for use *for hire*" (102 U. S. 244), this Court held that "it is manifest that no mere bailment for hire was intended" (102 U. S. 244), and that there was a sale. This Court said: "It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed *in connection with the other provisions,* so that if possible, or so far as is possible, they all may harmonize" (*Heryford* v. *Davis, supra,* 102 U. S. 235, 245). (Italics ours.)

Similarly here, "Though the contract industriously and repeatedly spoke of" sale for export—or if, in the language of the Court of Appeals "The contract bristles with provisions both general and specific" covering sale for export—"It is quite unmeaning" for CCC now to say that this alone was contracted for when the contract contains detailed and complete provision for "in store" sale.

Here, we would not question the justice of the decision below, if the sale for export provisions alone were contained in the contract. And CCC's counsel concedes that petitioner's claim could not be questioned if the "in store" sale provisions alone were contained in the contract (Savage affidavit, par. 6, App. p. 65a).

But the contract contains both. The true construction of the contract, therefore, is not to be found in its sale for export denomination, and not alone in the particular provisions covering sale for export, disconnected from the detailed "in store" sale provisions, which contain every element of contract for "in store" sale of all of the beans not delivered for export (Cf. *Heryford* v. *Davis*, *supra*, 102 U. S. 235, 243, 244, 245).

The decision below conflicts in principle with the above cited decisions of this Court, and is incorrect because it "obliterates" and "destroys" (*Burdon Sugar Refining Co.* v. *Payne*, *supra*, 167 U. S. 127, 142, 144) the "in store" sale provisions as fully as though they were not, and as though only the sale for export provisions were, contained in the contract.

The importance of review is magnified because the questions relate to administration of the Agricultural Acts (*United States* v. *Ruzicka*, *supra*, 329 U. S. 287); the limited discretion exercisable under the provisions of 7 U. S. C. sec. 1427, by CCC, as an administrative agency (15 U. S. C. sec. 714); and the resulting questions whether its "discretion is exhausted" (*United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318), when "prices, terms, and conditions" determined by it are embodied in "in store" sale provisions of a CCC contract, with no provision therein for modifications, termination or rescission thereof by CCC (Cf. *United States* v. *Speed*, 8 Wall. (75 U. S.) 77, 83).

8. There is applicable to a CCC contract, such as here involved, the principle that the contract is to be construed most strongly against the party who drew it.

Such was the rule applied respecting government contracts in *United States* v. *O'Brien*, 220 U. S. 321, 327, 328; *Garrison* v. *United States*, 7 Wall. (74 U. S.) 688, 690;

Otis v. *United States*, 20 Ct. Cl. 315, 327, affd. 120 U. S. 115; *Reconstruction Finance Corp.* v. *Sullivan Mining Co.*, 9 Cir., 230 F. 2d 247; *Callahan Construction Co.* v. *United States*, 91 Ct. Cl. 538.

It was in effect applied in *United States* v. *Speed, supra*, 8 Wall. (75 U. S.) 77, 83, in holding that while the commissary might have insisted on a discretionary clause, "he did not do so, and cannot have the benefit of it as though he had".

The "principles of general contract law" apply to its construction (*Priebe & Sons, Inc.* v. *United States*, 332 U. S. 407); and the government will not be treated more favorably than a private party would be (*Standard Rice Co. Inc.* v. *United States*, 323 U. S. 106; *S. R. A. Inc.* v. *Minnesota*, 327 U. S. 558; *Reading* v. *United States*, 268 U. S. 186, 188; *Hollenbach* v. *United States*, 233 U. S. 165, 171-172).

It is impossible to read the decision below, in the light of secs. 4 and 7 of the contract (App. pp. 13a-16a and *infra*, pp. 52-55), without realizing that the Court below has construed the contract so strongly against the petitioner as to create a different contract than the one that was made.

It is most important that this Court review and determine whether such is permissible with respect to a CCC contract.

9. There is no charge by CCC of fraud, bad faith or mistake, nor even of neglect by petitioner of efforts to export; but until the end petitioner sought to effectuate export, and CCC refused a request by petitioner for an extension of time in which to make additional export.

In *Franklin Telegraph Co.* v. *Harrison, supra*, 145 U. S. 459, 471, respecting a contract whereby, on expiry of ten years, the parties were to be governed by different provi-

sions than theretofore, this Court said, in language equally applicable to CCC here:

> "Why should not the telegraph company perform the terms of its contract? Its original execution was unattended by fraud, surprise, misrepresentation, imposition, concealment of material facts or mistake. The parties thoroughly understood the situation and knew what they were doing" (145 U. S. 471).

Similar reasoning was involved in holding the government liable on contracts which it sought to terminate or rescind in *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83, and in *United States* v. *Purcell Envelope Co.*, *supra*, 249 U. S. 313, 318-319.

On March 7, 1956, petitioner gave shipping instructions for 13,330 bags of beans additional to those previously exported, and requested an extension of time within which to export the remaining unexported part, stating that the request was necessitated by reason of the disruption of storage facilities in Europe (App. pp. 40a-41a; 53a). By telegram of March 9, 1956, CCC refused to honor shipping instructions, or to extend time for export (App. 54a); and by telegram of March 16, 1956, terminated the contract for failure to export "the total quantity" (App. p. 55a).

There is no charge or suggestion of any fraud, surprise, misrepresentation, imposition, concealment of material facts or mistake attendant on the making of the contract or thereafter.

It was within CCC's discretion whether to extend the time for export (App. p. 17a) or the "export limitation" (*Id.* p. 23a). But, on refusing an extension of time within which to export, CCC was bound, equally as was petitioner, by the "in store" sale provisions, fully detailed

as to "prices, terms, and conditions", and which if not binding on both parties "would else be a mockery" (Cf. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318).

Were there any charge of fraud, bad faith or mistake, the issue could not be determined on motion for summary judgment. Lacking any such charge, the determinative point is that a contract having been made, in good faith, in which CCC exercised its discretion to determine, establish, fix and agree to the "prices, terms, and conditions" (7 U. S. C. sec. 1427) of "in store" sale, with no provision therein for later exercise again of the same discretion (cf. *United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83), such "discretion is exhausted" (*United States* v. *Purcell Envelope Co.*, *supra*, 249 U. S. 313, 318), and CCC "cannot have the benefit of it as though" further discretion had been reserved by the contract (*United States* v. *Speed*, *supra*, 8 Wall. (75 U. S.) 77, 83).

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX A

The First Opinion (Order) of the United States District Court, Southern District of New York, Denying Motion and Cross Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

July 31, 1958

Plaintiff and defendant both move for summary judgment in an action in which both parties claim damages from the other for alleged breach of a contract for the sale of lima beans.

The focal point of the litigation is the construction to be given the writings comprising the contract.

Plaintiff claims it had the right to purchase the beans for export at a certain price and, at its option, for domestic sale at a higher price.

Defendant contends that the contract was a sale for export only with the proviso that it, the defendant, might at its option, permit the plaintiff to buy the beans for domestic resale.

> "What the parties meant • • • may be shown by evidence as to their understanding in that respect, even if that understanding preceded, or was contemporaneous with the making of the contract."[1]

An issue exists which precludes granting either motion.

The motion and cross motion are denied.

It is so ordered.

Signed SIDNEY SUGARMAN
United States District Judge

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1. *Virgin Island Corp.* v. *W. A. Taylor & Co.*, 202 F. (2) 61, 67 (2nd Cir. 1953).

APPENDIX B

The Second Opinion of the United States District Court, Southern District of New York, Dismissing the Complaint and Dismissing the Counterclaim

Sugarman, D. J.

On July 31, 1958, this Court denied plaintiff's motion (#87 of May 1, 1958) for summary judgment and also denied defendant's cross-motion (#33 of May 1, 1958) for summary judgment.

On August 12, 1958, plaintiff moved for reargument of its motion for summary judgment and for the granting thereof. Defendant did not, within the required time, move for reargument of its cross-motion for summary judgment.

The plaintiff's motion for reargument of its motion for summary judgment is granted and upon reargument the denial of summary judgment to plaintiff is adhered to. A reconsideration of the papers on both original motions and the admissions of the parties that those papers encompass the entire dealings of the parties, persuades me that the contract was not an absolute sale of the beans by defendant to plaintiff regardless of whether plaintiff exported them or sold them in the domestic market.

I cannot accept plaintiff's construction that its ultimate disposal of the beans affected only the price it was to pay defendant for them. Only if defendant consented to their disposition in the domestic market by demanding payment at the higher rate would the contract require delivery by defendant. To discharge its purpose of stabilizing the domestic market, defendant chose not to permit plaintiff to sell the beans in the domestic market. Under these circumstances, it did not breach the contract by

not delivering the balance of the beans "in store" at the end of the 180 day period wherein plaintiff was to export them.

Accordingly, plaintiff's complaint states no claim against defendant and denial of plaintiff's motion for summary judgment against defendant is adhered to.

Under the inherent power of the Court[1] defendant may have summary judgment dismissing the complaint and it is so ordered.

Although defendant did not move for reargument of the denial of its cross-motion for summary judgment on its counter claim, the Court on reconsidering that ruling adheres thereto.

It was pointed out above that defendant reserved the right under the contract to compel plaintiff to accept the unexported beans by demanding payment at the higher price. This it never did. Hence it cannot claim a breach by plaintiff for such non-acceptance.

Under the inherent power of the Court[2] plaintiff may have summary judgment dismissing the counterclaim set forth in the Fifteenth through Twenty-Second paragraphs of the answer and it is so ordered.

SIDNEY SUGARMAN
U.S.D.J.

Dated: October 6, 1958
New York, New York

Judgment entered: October 7, 1958

HERBERT A. CHARLSEN,
Clerk

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1. Cf. 6 Moore's Fed. Prac., 2088 para. 56.12.
2. Note 1 *supra*.

APPENDIX C

The First Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 238—October Term, 1958.

(Argued May 7, 1959. Decided May 20, 1959.)

Docket No. 25418

—o—

SINASON TEICHER INTER AMERICAN GRAIN CORP.,
Plaintiff-Appellant,

—v—

COMMODITY CREDIT CORPORATIONN,
Defendant-Appellee.

—o—

Before:

CLARK, Chief Judge,

WATERMAN, Circuit Judge, and EDELSTEIN, District Judge.

Sinason Teicher Inter American Grain Corp. appeals from a summary judgment entered in the United States District Court for the Southern District of New York, Sidney Sugarman, Judge, dismissing its complaint in an action for damages for breach of contract. Affirmed.

LESTER LYONS, New York City (Milton S. Teicher of New York City, on the brief), for plaintiff-appellant.

ARTHUR V. SAVAGE, Assistant United States Attorney for the Southern District of New York (Arthur H. Christy, United States Attorney for the Southern District of New York, on the brief), for defendant-appellee.

Per Curiam:

We affirm the summary judgment granted to defendant, the Commodity Credit Corporation. Its contract for the sale of beans to plaintiff "for export" imposed on the buyer an obligation to export that was of the essence. The contract bristles with provisions, both general and specific, pointing up this purpose so sharply that it can be ignored only on pain of impalement. The fact that there are also provisions in the contract relating to sale "in store" at a higher price, upon the buyer's failure to take delivery or to export, does not convert the contract into one effecting an absolute sale, with the buyer free to exercise an option not to export merely on the payment of a premium. These provisions define certain consequences of the buyer's failure, consequences that could be available only by contract; but there is nothing to suggest, as the plaintiff seems to assume, that these consequences are exclusive or that the defendant has contracted away the usual contract remedy of rescission. By failing to make timely arrangements for the export of 85% of the beans sold to it for export, the plaintiff committed a material breach of contract justifying rescission by the defendant.

APPENDIX D

The Second Opinion of the United States Court of Appeals for the Second Circuit, Denying Petitioner's Petition for Rehearing

Before: CLARK, Chief Judge, WATERMAN, Circuit Judge, and EDELSTEIN, District Judge.

On Petition for Rehearing.

Per Curiam:

The petition for rehearing is denied, although it is conceded that the Court's reference to "rescission" is technically inapposite. Nevertheless, we adhere to the position that the contractual provisions defining consequences of the buyer's failure are not exclusive and that the petitioner's default relieved defendant of further obligation to perform.

APPENDIX E

Statutory Provisions Involved

1. 15 U. S. C. sec. 714, Act of June 29, 1948, c. 704, sec. 2, 62 Stat. 1070, as amended June 7, 1949, c. 175, sec. 1, 63 Stat. 154, provides:

Sec. 714. Creation and purpose of Corporation.

For the purpose of stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities, products thereof, foods, feeds, and fibers (hereinafter collectively referred to as "agricultural commodities"), and of facilitating the orderly distribution of agricultural commodities, there is created a body corporate to be known as Commodity Credit Corporation (hereinafter referred to as the "Corporation"), which shall be an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture (hereinafter referred to as the "Secretary").

2. 15 U. S. C. sec. 714b(c) and (g), Act of June 29, 1948, c. 704, sec. 4, 62 Stat. 1070, as amended, provides:

Sec. 714b. General Powers of Corporation

The Corporation—

* * * * *

(c) May sue and be sued, * * *

* * * * *

(g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business.

* * *

3. 7 U. S. C. secs. 1421(a), 1427, 1429, Act of October 31, 1949, c. 792, Title IV, secs. 401, 407, 412, 63 Stat. 1054, 1055, 1057, with 7 U. S. C. sec. 1427 as amended July 10, 1954, c. 469, Title III, sec. 301, 68 Stat. 458, and July 29, 1954, c. 643, 68 Stat. 583, provide:

> Sec. 1421. Source of price support; authority of Secretary; factors considered; compliance by producer; time of determining levels
>
> (a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.
>
> • • • • •
>
> Sec. 1427. Sale of farm commodities; policy and rates of sale; exceptions; use of commodities to relieve distress.
>
> The Commodity Credit Corporation may sell any farm commodity owned or controlled by it at any price not prohibited by this section. In determining sales policies for basic agricultural commodities or storable nonbasic commodities, the Corporation should give consideration to the establishing of such policies with respect to prices, terms, and conditions as it determines will not discourage or deter manufacturers, processors, and dealers from acquiring and carrying normal inventories of the commodity of the current crop. The Corporation shall not sell any basic agricultural commodity or storable nonbasic commodity at less than 5 per centum above the current support price for such commodity, plus reasonable carrying charges. The foregoing restrictions shall not apply to • • • (D) sales of commodities which have substantially deteriorated in quality or as to which there is a danger of loss or waste through deterioration or spoilage; • • • (F) sales for export; • • • Nor shall the foregoing restrictions

apply to sales of commodities the disposition of which is desirable in the interest of the effective and efficient conduct of the Corporation's operations because of the small quantities involved, or because of age, location or questionable continued storability, but such sales shall be offset by such purchases of commodities as the Corporation determines are necessary to prevent such sales from substantially impairing any price-support program, but in no event shall the purchase price exceed the then current support price for such commodities.

* * * * *

Sec. 1429. Determinations of Secretary as final and conclusive.

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act.

APPENDIX F

The "In Store" Sale Provisions of the Contract

The Confirmation of Sale (App. p. 5a) executed by the parties provides:

"12. BASIS OF SETTLEMENT: Per GRT-318

. . . . . .

"OTHER: Entire quantity to be exported within 180 days from September 14, 1955. *All terms and conditions of Announcement GRT-318 to apply* except that reference to 60 days under Items 2, 3, 4, 5, 7 and 8 are hereby changed to read 180 days; and letter of credit is to be effected for 220 days instead of the 90 days as provided in Item 7 of GRT-318" (App. p. 5a). (Italics ours.)

GRT-318 contained provisions controlling sale for export, and in addition provisions, particularly in secs. 4 and 7, for "in store" sale of "the beans" not delivered for export, as follows:

"4. *Failure to take delivery—default.* If the buyer fails to take delivery of the beans within 60 calendar days from CCC's acceptance of buyer's bid, or any written extension by CCC of such 60-day period, it is agreed by the parties hereto that title and risk of loss, damage, or deterioration to the beans shall pass to the buyer in store in the warehouse where the beans are then located, upon acceptance by the buyer of the draft for payment of the amount due as provided hereafter in this Section 4. Such in store sale shall be for unrestricted use and the sales price of the beans shall be the higher of the following:

(a) CCC's statutory minimum sales price of beans of the same class and grade for unrestricted use, as determined by CCC, in effect on the date of CCC's acceptance of the buyer's bid,

(b) the sales price announced by CCC for sale of beans of the same class and grade for unrestricted use in effect on the date of CCC's acceptance of the buyer's bid, or

(c) if no such sales price as described in (b) has been announced, the domestic market price, as determined by CCC, in effect on such date.

Settlement for the sales price under this section shall be on the basis of the official grades shown on the inspection certificates and 100 pounds net per bag without adjustment for actual weights. The total amount due under this section shall be the amount of such sales price plus any unpaid storage or other charges for which the buyer may be liable.

If the financial arrangement made by the buyer in accordance with section 7 hereof is by irrevocable letter of credit, a draft, supported by a letter signed by the Chief or Acting Chief of the Fiscal Division of the CSS Commodity Office as provided in such section, will be drawn by CCC against the full amount of the letter of credit in partial payment of the amount due CCC. If the financial arrangement made by the buyer is by deposit of cash or a certified or cashier's check, CCC will apply the full amount thereof in partial payment of the amount due.

The balance of the amount due CCC shall be covered by a sight draft drawn by CCC upon the buyer

and supported by the warehouse receipts and official grade inspection certificates for the beans.

In the event that the buyer fails to honor such sight draft, CCC may terminate his rights under the in store sale because of his default and sell the beans for his account either on a bid or negotiated basis, for the best price obtainable as determined by CCC. The proceeds of such sale shall be applied against the amount due by the buyer under this section. The remainder of such amount shall be collected by CCC applying the funds in its hands accruing from the financial arrangements made by the buyer, and any deficiency shall be paid by the buyer. Any balance of such funds shall be refunded to the buyer.

* * * * *

6. *Title and Risk of Loss, Damage or Deterioration.* * * * where the buyer fails to take delivery within the time specified in section 4 hereof, title and risk of loss, damage or deterioration shall pass to the buyer 'in store' as provided in such section.

7. *Financial arrangements.* (a) Financial arrangements in an amount equal to the total number of bags purchased times the unit price stated in the buyer's bid and acceptance by CCC shall be made within 10 calendar days after the date of acceptance of the buyer's bid by CCC or by the time first shipping instructions are received by CCC, whichever is earlier. Such financial arrangements shall be made, with the CSS Commodity Office designated in CCC's acceptance of the buyer's bid, by payment in cash, by certified or cashier's check, or by establishment of an irrevocable commercial letter of credit

acceptable to CCC. In order to be acceptable, a letter of credit must (a) be effective for not less than 90 days; (b) provide for payment at sight and be payable at par; (c) must provide that drafts drawn by CCC may be supported by either: (1) an invoice, inspection certificates, official weight certificates or commodity examination reports, and bills of lading or (2) a letter signed by the Chief or Acting Chief of the Fiscal Division of the CSS Commodity Office, stating the amount due CCC on an in store sale of the beans for unrestricted use resulting from the buyers' failure to take delivery of the beans within 60 calendar days after the date of CCC's acceptance of the buyers' bid or any written extension by CCC of such period.

(b) If the buyer fails to make financial arrangements in accordance with Section 7(a), CCC shall have the right to deem the buyer in default and to avail itself of any remedy available to it. The buyer shall be liable to CCC for any loss or damage resulting from such default."

The Corresponding Separate "Upward Adjustment" Provisions for Reimported or Unexported Beans Delivered for Export

GRT-318 contained, in sec. 8, provisions applicable to beans delivered for export, and separately providing in corresponding detail for "upward adjustment" of sales price as to any beans actually delivered for export but which are not exported or after being exported are reentered into the United States, as follows:

"8. *Export requirements.* (a) The buyer shall, within 60 calendar days from the date of CCC's acceptance of the buyer's bid, or within such exten-

sion or extensions of that period as may be authorized by CCC in writing before or after expiration of such 60 calendar day period, cause exportation of the identical beans delivered hereunder by CCC to a foreign country (territories and possessions of the United States are excluded). The buyer shall, within 30 calendar days after exportation of the beans, furnish to CCC proof of such exportation as specified in section 9 hereof. Failure of the buyer to furnish CCC proof of exportation within 90 calendar days after the date of CCC's acceptance of the buyer's bid, or, in the case of extension of the time for export, within 30 calendar days from the last date for exportation under such extension, shall constitute prima facie evidence of failure to export.

(b) If the buyer does not cause exportation of the identical beans delivered hereunder by CCC within the period specified in (a) of this section, or if exportation is made and any of the beans exported are reentered into the United States, or any of its territories or possessions, whether or not such reentry is caused by the buyer, the sales price with respect to the quantity which is reentered or not so exported shall be adjusted upward by the amount that such sales price is exceeded by the higher of (1) CCC's statutory minimum sales price of beans of the same class and grade for unrestricted use, as determined by CCC, in effect on the date of CCC's acceptance of the buyer's bid, or (2) the sales price announced by CCC for sale of beans of the same class and grade for unrestricted use in effect on the date of CCC's acceptance of the buyer's bid, or, if no such sales price has been announced, the domestic market price as determined by CCC, in effect on such date. The total amount

of any upward adjustment in sales price arising under this Section shall be paid by the buyer to CCC promptly upon demand. Any such upward adjustment of sales price will be waived to the extent that the Vice President of CCC, or his designated representative, finds that failure to export, as specified in (a) of this section, (1) was due to unforseeable causes beyond the control, and without the fault or negligence, of the buyer, and that such quantity of beans was, pursuant to written approval of CCC, subsequently actually exported to a foreign country within the time specified in writing by CCC, or (2) was the result of its loss, damage, destruction, or deterioration and that the physical condition thereof is such that its entry into domestic channels will not impair CCC's price support operations."

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FILED
SEP 16 1959
JAMES R. BROWNING, Clerk

No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1959

SINASON TEICHER INTER AMERICAN GRAIN CORP.,
PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Pet. 44–45) is not reported. The opinions of the United States Court of Appeals for the Second Circuit (Pet. 46–48) are reported at 267 F. 2d 493.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1959 (Pet. 46). A timely petition for rehearing was denied on June 15, 1959 (Pet. 48). The petition for a writ of certiorari was filed on August 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Commodity Credit Corporation contracted to sell beans to petitioner for export within six months. The question presented is whether both courts below correctly construed the contract as imposing, as a condition of sale, that the beans be exported within six months, so that petitioner's failure to do so constituted a breach of contract which relieved the seller of any further obligation to make delivery.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition (Pet. 49–51).

STATEMENT

Respondent Commodity Credit Corporation ("Commodity") contracted to sell to petitioner some 210,000 sacks of dry baby lima beans, for export within six months (R. 5a–23a, 77a). When petitioner failed to export more than a small fraction of the beans within that period, Commodity notified petitioner that such failure was a material breach of the contract and that, accordingly, it was no longer obligated to deliver the remaining beans to petitioner (R. 55a). Petitioner thereupon instituted the present action for damages for breach of contract (R. 3a–4a). The district court granted summary judgment in favor of Commodity (Pet. 44–45), and the court of appeals unanimously affirmed (Pet. 46–48).

The contract between petitioner and Commodity consists of a telegraphic bid, a telegraphic acceptance, and a confirmation of sale (R. 5a, 77a, 109a). The bid and the confirmation incorporated by reference

the terms and conditions of a Department of Agriculture announcement of sale (No. GRT 318), and a supplement thereto (R. 5a, 77a).[1]

The announcement, which was captioned "Sale of Dry Edible Beans for Export," declared that buyers of the beans would be required, within 60 days, to "cause exportation of the identical beans delivered hereunder by CCC to a foreign country (territories and possessions of the United States are excluded)" (*infra*, pp. 10, 14). Delivery was to be made "FAS at the port or FOB car or truck at the border point specified in buyer's bid" (*infra*, p. 10). Title and risk were to pass "at the time the beans are loaded onto railroad cars or trucks for shipment to port or border point" (*infra*, p. 13).

Section 4 of the announcement provided that, "if the buyer fails to take delivery [for export within the contract period,] title * * * shall pass to the buyer in store in the warehouse where the beans are then located, upon acceptance by the buyer of the draft for payment of the amount due as provided hereafter in this Section 4. Such in store sale shall be for unrestricted use" (*infra*, p. 11). The section further provided that petitioner would be obligated to pay for the beans at a price higher than if it received them for export (*infra*, p. 11).

The supplement similarly stated that Commodity was offering certain beans "for sale for export" (*infra*, p. 15). It declared that "consideration may be given to bids for beans moved to new export

[1] The relevant provisions of the announcement and the supplement are set forth in the appendix, pp. 10–16, *infra*.

markets," but that, if the bidder did not state a specific country of destination, it would be assumed "that the beans are for export to established markets" (*infra*, p. 16).

Petitioner telegraphed a bid for the purchase of the beans which stated that, "to effectuate the export of such large quantities" of beans "without disturbance of foreign markets," it would need more than 60 days to complete shipments abroad (R. 77a). In accepting petitioner's bid, Commodity declared that the "entire quantity [of beans was] to be exported within 180 days from Sept. 14, 1955" (R. 5a).

By March 16, 1955, the expiration of the 180-day period, petitioner had given shipping instructions for, and Commodity had delivered, only 28,805 of the 210,000 sacks of beans (R. 28a, 50a).[2] On that date, Commodity notified petitioner that its failure to export all the beans was a material breach of the contract and that, accordingly, Commodity was under no obligation to deliver the remaining sacks (R. 55a). Petitioner then instituted the present action against Commodity for damages for breach of contract (R. 3a–4a). Its theory was that, by virtue of section 4 of the announcement (*supra*, p. 3), title to the beans had automatically passed to petitioner upon the expiration of the 180-day period, and that, therefore, Commodity was obligated, upon demand, to deliver

[2] On March 8 and 9, Commodity's contracting officer had received shipping instructions for an additional 13,300 sacks of beans. Commodity, however, rejected these instructions (as authorized by section 3 of GRT 318) on the ground that they were not received in time to make delivery to meet vessel schedules (*infra*, p. 11; R. 28a, 96a–97a).

the beans for petitioner's unrestricted use (R. 3a–4a).[3]

In entering summary judgment for Commodity, the district court rejected petitioner's theory that under the contract "it had the right to purchase the beans for export at a certain price and, at its option, for domestic sale at a higher price" (Pet. 43). The court ruled (Pet. 44) that "the contract was not an absolute sale of the beans by defendant to plaintiff regardless of whether plaintiff exported them or sold them in the domestic market." It construed section 4 as merely giving Commodity the option to require petitioner to accept the beans in-store at the higher price (*ibid.*).

The Court of Appeals affirmed in a brief *per curiam* opinion (Pet. 46–47). It held that the "contract for the sale of beans to plaintiff 'for export' imposed on the buyer an obligation to export that was of the essence. The contract bristles with provisions, both general and specific, pointing up this purpose so sharply that it can be ignored only on pain of impalement" (Pet. 47). The court ruled that section 4 "does not convert the contract into one effecting an absolute sale, with the buyer free to exercise an option not to export merely on the payment of a premium."

[3] Commodity counterclaimed, alleging that petitioner had breached the contract by failing to submit shipping instructions covering the export of the beans within the contract period (R. 26a–29a). The district court entered summary judgment against Commodity on the counterclaim on the ground that, since Commodity had not exercised its option to require petitioner to accept the beans in-store, it could not claim a breach for nonacceptance (Pet. App. 45). Commodity did not appeal the ruling.

Rather, the court continued, the in-store sale provisions "define certain consequences of the buyer's failure, consequences that could be available only by contract" and "there is nothing to suggest * * * that these consequences are exclusive" or that, by including them in the contract, Commodity "has contracted away the usual contract remedy of rescission" (Pet. 47). The court concluded (*ibid.*) that, "[b]y failing to make timely arrangements for the export of 85% of the beans sold to it for export, the plaintiff committed a material breach of contract justifying rescission by the defendant."[4]

ARGUMENT

Contrary to petitioner's contention (Pet. 10–12, 36–40), this case presents no statutory issues or important questions of contract law. It involves only the construction of the particular contract, and has no significance beyond this immediate case.[5] We submit that both courts below correctly held that the contract required petitioner, as a condition of the sale, to export the beans within the specified period and entitled Commodity, upon petitioner's failure to do so, to refuse to make further deliveries. Review by this Court is not warranted.

[4] In denying rehearing the court, although conceding that its prior reference to "rescission" was "technically inapposite [n]evertheless * * * adhere[d] to the position that the contractural provisions defining consequences of the buyer's failure are not exclusive and that the petitioner's default relieved defendant of further obligation to perform" (Pet. 48).

[5] We have been advised by the Department of Agriculture that the particular form of contract here involved is no longer in use and that there is no other pending litigation concerning its construction.

1. Read as a whole, the contract clearly shows that the obligation to export within the stipulated period was, as the court of appeals stated (Pet. 47), "of the essence." The contract stipulated that this was a sale of dry edible beans "for export" (*infra*, p. 10), and petitioner assumed an obligation to "cause exportation of the * * * beans" (*infra*, p. 14). The invitation for bids stated that consideration would be given to bids proposing to move the beans "to new export markets," but that if no country of destination were listed in the bid it would be assumed "that the beans are for export to established markets" (*infra*, p. 16). Commodity was to make delivery "FAS at * * * port or FOB car or truck at * * * border point" (*infra*, p. 10). Title and risk were to pass when the beans were loaded "for shipment to port or border point" (*infra*, p. 13). Indeed, petitioner expressly recognized that the sale of the beans was conditioned on their being exported. For it sought an additional period for shipment, in order "to effectuate the export of such large quantities" of beans "without disturbance of foreign markets" (R. 77a).

2. Petitioner contends (Pet. 22–26), however, that under the contract the exclusive remedy for failure to export the beans within 180 days was for Commodity to tender the beans to it pursuant to section 4 of the announcement; and that it, therefore, had the right to take title to the unexported beans for unrestricted use, including domestic disposition, merely by paying the higher price.

We submit that the courts below correctly rejected this unwarranted construction of the contract. Since

the purpose of Commodity's purchasing and storing operations is to stabilize the domestic market, it would be anomalous if the contract left it to the purchaser to decide whether the beans should be introduced into that market. On the contrary, as the district court ruled (Pet. 44), the contract gave Commodity the power to make that decision, and here, "[t]o discharge its purpose of stabilizing the domestic market, defendant chose not to permit plaintiff to sell the beans in the domestic market."

A specific remedy in a contract is not exclusive "unless the language of the part of the agreement in question, or of the entire agreement, together with other relevant evidence, if any, shows a contrary intent."[8] Neither the agreement itself, nor anything in the record, shows that section 4 was intended to provide an exclusive remedy. On the contrary, it provided that an additional remedy "plainly is for the benefit of the vendor" which "may be insisted upon or waived at his choice." *Stewart* v. *Griffith*, 217 U.S. 323, 329; *Western Union Telegraph Co.* v. *Brown*, 253 U.S. 101, 111; *Salant* v. *Fox*, 271 Fed. 449 (C.A. 3). Here, Commodity did not exercise its additional remedy, but instead treated petitioner's non-performance as a breach of contract which terminated its obligation to make further deliveries.

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[8] *Roth* v. *Hartl*, 365 Pa. 428, 75 A. 2d 583, 586; *Kilsheimer* v. *Ross & Moskowitz*, 257 F. 2d 242, 245 (C.A. 2); *Biscayne Shores, Inc.* v. *Cook*, 67 F. 2d 144, 145 (C.A. 3); *Randall* v. *Douglass*, 321 Mich. 492, 32 N.W. 2d 721; *Leeper* v. *Murdock*, 168 Tenn. 192, 76 S.W. 2d 335; *Asia Investment Co.* v. *Levin*, 118 Wash. 620, 204 Pac. 808. See *Plimpton* v. *Mattakeunk Cabin Colony*, 9 F. Supp. 288 (D. Conn.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
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ALAN S. ROSENTHAL,
SHERMAN L. COHN,
Attorneys.

SEPTEMBER 1959.

APPENDIX

Announcement GRT 318 (June 27, 1955), Department of Agriculture:

SALE OF DRY EDIBLE BEANS FOR EXPORT

The U.S. Department of Agriculture announces the contemplated sale by the Commodity Credit Corporation (hereinafter referred to as "CCC") of certain of its stocks of dry edible beans for export. * * *

* * * * * * *

3. *Delivery and marking.* The buyer shall furnish to CCC shipping instructions in time to permit delivery of the beans to the buyer and his exportation thereof within 60 calendar days after the date of CCC's acceptance of the buyer's bid or within any written extension by CCC of such period. CCC will deliver the beans FAS at the port or FOB car or truck at the border point specified in buyer's bid, upon receipt by the CSS Commodity Office designated in CCC's acceptance of the buyer's bid of complete written shipping instructions and after completion of financial arrangements in accordance with Section 7 hereof. Shipping instructions must include at least the following and such additional information as CCC may require in the appropriate supplement to this announcement:

For FAS port

1. Name of port.
2. Name of vessel.
3. Name of steamship company.
4. Receiving dates of vessel.
5. Name and address of forwarder or agent to be notified, if any.

For FOB car or truck at a border point

1. Name of border point.

2. Name and address of forwarder, consignee, or agent to be notified, if any.

Shipping instructions may be rejected if in the opinion of CCC they are not received in time to make delivery to meet vessel schedules. Any wharf demurrage will be for the account of the buyer except in the case of delay on the part of CCC.

Any marking will be for the account of the buyer. Marking instructions may be furnished direct to the warehouseman or may be furnished to CCC together with the shipping instructions.

4. *Failure to take delivery—default.* If the buyer fails to take delivery of the beans within 60 calendar days from CCC's acceptance of buyer's bid, or any written extension by CCC of such 60-day period, it is agreed by the parties hereto that title and risk of loss, damage, or deterioration to the beans shall pass to the buyer in store in the warehouse where the beans are then located, upon acceptance by the buyer of the draft for payment of the amount due as provided hereafter in this Section 4. Such in store sale shall be for unrestricted use and the sales price of the beans shall be the higher of the following:

(a) CCC's statutory minimum sales price of beans of the same class and grade for unrestricted use, as determined by CCC, in effect on the date of CCC's acceptance of the buyer's bid,

(b) the sales price announced by CCC for sale of beans of the same class and grade for unrestricted use in effect on the date of CCC's acceptance of the buyer's bid, or

(c) if no such sales price as described in (b) has been announced, the domestic market price, as determined by CCC, in effect on such date.

Settlement for the sales price under this section shall be on the basis of the official grades shown on the inspection certificates and 100 pounds net per bag without adjustment for actual weights. The total amount due under this section shall be the amount of such sales price plus any unpaid storage or other charges for which the buyer may be liable.

If the financial arrangement made by the buyer in accordance with section 7 hereof is by irrevocable letter of credit, a draft, supported by a letter signed by the Chief or Acting Chief of the Fiscal Division of the CSS Commodity Office as provided in such section, will be drawn by CCC against the full amount of the letter of credit in partial payment of the amount due CCC. If the financial arrangement made by the buyer is by deposit of cash or a certified or cashier's check, CCC will apply the full amount thereof in partial payment of the amount due.

The balance of the amount due CCC shall be covered by a sight draft drawn by CCC upon the buyer and supported by the warehouse receipts and official grade inspection certificates for the beans.

In the event that the buyer fails to honor such sight draft, CCC may terminate his rights under the in store sale because of his default and sell the beans for his account either on a bid or negotiated basis, for the best price obtainable as determined by CCC. The proceeds of such sale shall be applied against the amount due by the buyer under this section. The remainder of such amount shall be collected by CCC applying the funds in its hands accruing from the financial arrangements made by the buyer, and any deficiency shall be paid by the buyer. Any balance of such funds shall be refunded to the buyer.

* * * * *

6. *Title and Risk of Loss, Damage or Deterioration.* Title and all risk of loss, damage

or deterioration shall pass to the buyer at the time the beans are loaded onto railroad cars or trucks for shipment to port or border point: *Provided,* that where the buyer fails to take delivery within the time specified in section 4 hereof, title and risk of loss, damage or deterioration shall pass to the buyer "in store" as provided in such section.

7. *Financial arrangements.* (a) Financial arrangements in an amount equal to the total number of bags purchased times the unit price stated in the buyer's bid and acceptance by CCC shall be made within 10 calendar days after the date of acceptance of the buyer's bid by CCC or by the time first shipping instructions are received by CCC, whichever is earlier. Such financial arrangements shall be made, with the CSS Commodity Office designated in CCC's acceptance of the buyer's bid, by payment in cash, by certified or cashier's check, or by establishment of an irrevocable commercial letter of credit acceptable to CCC. In order to be acceptable, a letter of credit must (a) be effective for not less than 90 days; (b) provide for payment at sight and be payable at par; (c) must provide that drafts drawn by CCC may be supported by either: (1) an invoice, inspection certificates, official weight certificates or commodity examination reports, and bills of lading or (2) a letter signed by the Chief or Acting Chief of the Fiscal Division of the CSS Commodity Office, stating the amount due CCC on an in store sale of the beans for unrestricted use resulting from the buyers' failure to take delivery of the beans within 60 calendar days after the date of CCC's acceptance of the buyers' bid or any written extension by CCC of such period.

(b) If the buyer fails to make financial arrangements in accordance with Section 7(a), CCC shall have the right to deem the buyer in default and to avail itself of any remedy available to it. The buyer shall be liable to

CCC for any loss or damage resulting from such default.

8. *Export requirements.* (a) The buyer shall, within 60 calendar days from the date of CCC's acceptance of the buyer's bid, or within such extension or extensions of that period as may be authorized by CCC in writing before or after expiration of such 60 calendar day period, cause exportation of the identical beans delivered hereunder by CCC to a foreign country (territories and possessions of the United States are excluded). The buyer shall, within 30 calendar days after exportation of the beans, furnish to CCC proof of such exportation as specified in section 9 hereof. Failure of the buyer to furnish CCC proof of exportation within 90 calendar days after the date of CCC's acceptance of the buyer's bid, or, in the case of extension of the time for export, within 30 calendar days from the last date for exportation under such extension, shall constitute prima facie evidence of failure to export.

(b) If the buyer does not cause exportation of the identical beans delivered hereunder by CCC within the period specified in (a) of this section, or if exportation is made and any of the beans exported are reentered into the United States, or any of its territories or possessions, whether or not such reentry is caused by the buyer, the sales price with respect to the quantity which is reentered or not so exported shall be adjusted upward by the amount that such sales price is exceeded by the higher of (1) CCC's statutory minimum sales price of beans of the same class and grade for unrestricted use, as determined by CCC, in effect on the date of CCC's acceptance of the buyer's bid, or (2) the sales price announced by CCC for sale of beans of the same class and grade for unrestricted use in effect on the date of CCC's acceptance of the buyer's bid, or, if no such sales price has been announced, the domestic market price as determined by CCC,

in effect on such date. The total amount of any upward adjustment in sales price arising under this Section shall be paid by the buyer to CCC promptly upon demand. Any such upward adjustment of sales price will be waived to the extent that the Vice President of CCC, or his designated representative, finds that failure to export, as specified in (a) of this section, (1) was due to unforeseeable causes beyond the control, and without the fault or negligence, of the buyer, and that such quantity of beans was, pursuant to written approval of CCC, subsequently actually exported to a foreign country within the time specified in writing by CCC, or (2) was the result of its loss, damage, destruction, or deterioration and that the physical condition thereof is such that its entry into domestic market channels will not impair CCC's price support operations.

* * * * *

Portland Supplement #1 (~~June~~ July 6, 1955) to Announcement GRT-318:

SALE OF DRY EDIBLE BEANS FOR EXPORT

Pursuant to the terms and conditions of Announcement GRT-318, dated June 27, 1955, the U.S. Department of Agriculture (CCC) offers for sale for export certain of its stock, as available, of 1954 crop beans on a bid and acceptance basis. Approximate quantities, classes and export ports applicable to the beans offered are shown on the attached Scheduled A. * * *

* * * * * *

The terms and conditions of Announcement GRT-318, dated June 27, 1955, this supplement and the confirmation of sale executed by CCC and the buyer, shall constitute the entire contract between the buyer and CCC. Any special terms or conditions, not covered herein or under Announcement GRT-318, will be stated in

the confirmation of sale which will govern with respect to such special terms and conditions.

As consideration may be given to bids for beans moving to new export markets the specific country of destination, if known, should be stated in the bid. If a specific country is not stated CCC will assume that the beans are for export to established markets.

* * * * *

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FILED
SEP 30 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 318

SINASON TEICHER INTER AMERICAN GRAIN CORP.,

Petitioner,

AGAINST

COMMODITY CREDIT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 318

SINASON TEICHER INTER AMERICAN GRAIN CORP.,
Petitioner,

AGAINST

COMMODITY CREDIT CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

1. Can CCC escape 7 U. S. C. §1427, the source of its "determining" powers employed in contracting, and expressly relied on by respondent below?

The principal content of Respondent's Brief is its bald, unsupportable assertion that "this case presents no statutory issues or important questions of contract law" (Respondent's Brief, p. 6), coupled with its calculated omission even to cite 7 U. S. C. §1427.

The statement is transparent and absurd once that statute and the Petition are read. Its potentiality lies solely in the possibility that, if read first, such an assertion by

or in the name of the Solicitor General of the United States might be deemed the postulate of the case, acknowledged by the parties, and thus beguile the Court from reading the statute and the Petition to ascertain the great questions in truth presented thereby.

It is that statute, 7 U. S. C. §1427 (Appendix E of Petition, p. 50), which confers, with "restrictions", upon CCC as an agency and instrumentality of the United States, CCC's peculiar power and discretion of "determining" the "prices, terms, and conditions as it determines", when exercising its power thereunder to "sell"; and CCC clearly relied on that statute in making the contract.

The contract itself, in Section 4 (Petition Appendix F, pp. 52-53), states that the in store "sales price of the beans" shall be the higher of three sales prices, each "*determined* by CCC" and "*in effect on the date of CCC's acceptance of the buyer's bid*". Thus recited, they were, therefore, already or thereby "determined" as recited.

This case thus presents, inescapably, under 7 U. S. C. §1427, the great question whether the in store sale prices, terms and conditions could be "determined by CCC", "in effect on the date of CCC's acceptance of the buyer's bid", and, as such, be embodied in the contract, as recited therein, without CCC's having thereby "exercised" (Cf. *United States* v. *Speed*, 8 Wall. (75 U. S.) 77, 83) and "exhausted" (Cf. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, 319), its discretion and power under 7 U. S. C. §1427.

Respondent's total failure to discuss this question, presented by the Petition, or to attempt to refute its importance or merit, is indicative of realization that the case should be reviewed and reversed.

The importance of the questions this case presents under 7 U. S. C. §1427, moreover, is not limited to the particular GRT-318 form of contract here involved, as now contended by Respondent (Respondent's Brief, p. 6), but extends to *all* CCC contracts which embody *any* "prices, terms, and conditions as it determines" in exercise of its powers under 7 U. S. C. §1427; and it is of national importance that this Court review and determine these questions in this case.

2. The Statute, 7 U. S. C. §1427, affords the only "exceptional reason" enabling CCC to make any use limitation contracts, and must be looked to in determining their meaning and effect.

Limitations or restrictions by a seller upon use by a purchaser of property being sold "are at least *prima facie* invalid," and "must be justified for some exceptional reason" (*R. C. A. Manufacturing Co.* v. *Whiteman*, 2 Cir., 114 F. 2d 86, 80, cert. denied 311 U. S. 712); and Courts then "require unequivocal language to create such restrictions" (*Chicago Daily News* v. *Kohler*, 360 Ill. 351, 363).

The required "exceptional reason" spoken of by Judge Learned Hand in the *R. C. A.* case is afforded here only by the statute, 7 U. S. C. §1427. And this case involves fundamentally the great questions presented by the Petition as to the scope, exercise, final and conclusive effect of exercise, and exhaustion by exercise, of the power and discretion conferred on CCC by 7 U. S. C. §1427.

3. Respondent's present contention that no statutory issue is presented is contrary to the contentions made by Respondent and adopted by the courts below.

Respondent's present bald assertion that the case "presents no statutory issues" (Brief for Respondent, p. 6) is directly contrary to the affidavits of Assistant United States Attorney Savage and Mr. Dean, Deputy General Sales Manager of Commodity Stabilization Service, relied on by Respondent below (App. pp. 68a-70a; 78a-80a).

Both affidavits quoted from 7 U. S. C. §1427 (App. pp. 69a; 78a-79a) and contended that the statute afforded CCC a post-contractual "absolute discretion" as respects in store sale, exercisable by CCC upon expiration of the 180 days time allowed for export.

Mr. Savage insisted that "To have *freed* the subject beans for unrestricted domestic sale *after* plaintiff's failure to export" (App. p. 68a), "would have been contrary to *the requirements of 7 U. S. C. 1427*" (App. p. 69a) and "*ultra vires*" (App. p. 70a) unless "CCC *in its absolute discretion determined* that unrestricted domestic disposal would not have an unstabilizing effect".

Mr. Dean's affidavit insisted that "The prices, terms and conditions" for an in store sale "*must be* such as will not discourage or deter the acquisition and carrying of normal inventories by processors, dealers and manufacturers"; that "Sales *cannot be made* at prices, in outlets, or for uses, which unduly interfere with the operation of the price support program or depress farm prices on farm income" (App. 79a); that CCC therefore had "*an option*" to *enforce* the in store sale provisions provided this "would be consistent with the *statutory and policy restrictions*", but that "Before the *option* could be exercised in any case by Commodity Credit Corporation, it *would have to be determined* that the exercise of

such option and the delivery of the beans for unrestricted use would comply with the disposal policy of the Corporation and the *statutory directives*" (App. p. 80a).

He asserted that "*When the period for exportation under the contract* * * * *had expired*, Commodity Credit Corporation carefully *considered whether* it should exercise its *option* to deliver the beans for unrestricted use * * * and *it was determined* that a *delivery* for unrestricted use would * * * adversely affect the current price support program" and "Accordingly, Commodity Credit Corporation notified Sinason Teicher Inter American Grain Corp. that beans could not be *delivered* for unrestricted use" (App. 82a).*

Thus the fundamental point of Respondent's defense and counterclaim was its contention that, notwithstanding the detailed in store sale "prices, terms and conditions" determined by CCC under 7 U. S. C. §1427 and embodied in the contract and specifically "agreed [to] by the parties hereto" (Contract Sec. 4, App. pp. 13a-14a; Appendix F of Petition, p. 54), the statutory "*requirements of 7 U. S. C. 1427*", "*the statutory and policy restrictions*" and "*the statutory directives*" independently afforded and imposed on CCC a continuing statutory post-contractual "absolute discretion", exercisable "when the period for exportation under the contract * * * had expired", to determine *then* whether to perform or not to perform the in store sale provisions previously determined by it and embodied in the contract.

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* Actually, CCC had claimed "breach of contract" by Petitioner, and that CCC would hold Petitioner responsible for damages (App. p. 55a); and CCC counterclaimed for $85o5,659.86 damages (App. pp. 27a-29a), and cross-moved for summary judgment therefor (App. 63a), which motion the District Court denied on the ground that CCC having failed to demand in store sale performance, "cannot claim a breach by plaintiff" (Appendix B of Petition, p. 45).

Such theory was adopted by the Courts below, although with notable confusion. The District Court held that CCC "did not breach the contract by not delivering the balance of the beans 'in store' at the end of the 180 day period wherein plaintiff was to export them", but also held that CCC "cannot claim a breach by plaintiff", because CCC had failed to demand in store sale performance by plaintiff (Appendix B of Petition, pp. 44-45).

The Court of Appeals first ruled that Petitioner's failure to expor[illegible] the beans justified "rescission by the defendant" of th[illegible] in store sale provisions (Appendix C of Petition, p. 47); then, in denying rehearing, it held that the "rescission" theory was "inapposite", but that "the contractual provisions *defining consequences* of the buyer's failure are not exclusive and that the petitioner's default relieved defendant of *further obligation to perform*" (Appendix D of Petition, p. 48).

A resulting basic and fundamental question, therefore, is whether, under 7 U. S. C. §1427, notwithstanding the in store sale "prices, terms, and conditions" of the contract, already "determined" by CCC and specifically "agreed [to] by the parties", CCC, perforce that statute, had a statutory continuing absolute discretion to be "relieved" of its "further obligation to perform" the in store sale provisions agreed to, or whether its statutory discretion as respects in store sale as well as sale for export had been fully "exercised" (Cf. *United States* v. *Speed*, 8 Wall [75 U. S.] 77, 83) and "exhausted" (Cf. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, 319), when the in store sale provisions, including complete in store sale "prices, terms, and conditions" already determined by it, were embodied in the contract.

4. Can CCC utilize its "determining" powers under 7 U. S. C. §1427 as an instrument for unilateral and punitive speculating?

While not so labeled in its Brief, Respondent's whole argument is premised on a theory that CCC's "determining" powers under 7 U. S. C. §1427 enable it to make determinations of "prices, terms, and conditions" which, although embodied and agreed to by both parties in a contract, become binding on a buyer, but wholly tentative and optional as to CCC.

This involves the theory that CCC's "determining" power under 7 U. S. C. §1427 enables it to speculate on the basis of determinations which are punitively binding on a buyer but subject to post-contractual avoidance by CCC.

Such is the effect, for example, of Respondent's argument that the in store sale "prices, terms, and conditions", determined by CCC and embodied in the contract, established as to CCC merely an optional "remedy" for the benefit alone of CCC and which may be insisted upon or waived by CCC at its choice (Respondent's Brief, pp. 7-8).

But CCC is not a mere John Doe or Richard Roe, freely and sharply trading for profit, but is "an agency and instrumentality of the United States" (15 U. S. C. §714), whose every contract embodying "prices, terms, and conditions" involves CCC's first or thereby "determining" these under 7 U. S. C. §1427.*

* The cases cited in Respondent's Brief, p. 8, are entirely different and have no bearing here. Most of them are specific performance cases holding that specific performance in equity is not precluded by provisions for forfeitures of down payments by purchasers. Others are cases holding that provisions for payment by a contractor of a stated sum if performance fell below stated requirements do not relieve the contractor of his obligation to perform.

The power of "determining" these is not a power of "determining" them as respects the other contractor alone, but of "*determining*" them—i. e., "determining" them for all purposes of the contract which embodies them.

The embodiment in the contract of the in store sale "prices, terms, and conditions" necessarily involved CCC's "*determining*" them under 7 U. S. C. §1427 for all purposes of the contract, as respects CCC as well as the buyer. When embodied in the contract, CCC could not later maintain that these determinations were punitively binding on the buyer, but were tentative and speculative as to CCC. The statute, 7 U. S. C. §1427, gives CCC no such power to speculate and make post-contractual change of "determinations" without the consent and at the sole risk of the buyer.

5. Respondent's confusion of rights and remedies.

The in store sale provisions are not, as Respondent represents (Respondent's Brief, p. 7), provisions which merely establish a "remedy".

On the contrary, they establish contractual *rights*—what paragraph 4 of the contract itself calls "his *rights* under the in store sale" (App., p. 13a; Appendix F of Petition, p. 54)—*rights* which were as definitely "determined" by CCC under 7 U. S. C. §1427 and contracted for by the parties as were the sale for export rights. And as this Court frequently has held, there is a fundamental distinction between rights and remedies.

The in store sale provisions are similar to but more complete than "a continuing offer to sell" at a pre-determined price, embodied in a lease, such as involved in *Willard* v. *Taylor*, 8 Wall. (75 U. S.) 557, 564. They are rather an effective part of a continuing contract of pur-

chase and sale—at one pre-determined price for export within 180 days, and at another pre-determined price for unrestricted use upon expiry of 180 days. Petitioner, it is not denied, was *bound* thereby; but *so also, was CCC.*

CONCLUSION

The quality of post-contractual discretion claimed by CCC to refuse to perform the in store sale provisions "determined" by CCC under 7 U. S. C. §1427 and agreed to by both parties to the contract presents questions of national importance which this Court should review.

Respectfully submitted,

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